

# DOES A PARTIAL SETTLEMENT FOR LESS THAN FULL PRIMARY LIMITS TRIGGER THE EXCESS?

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## I. INTRODUCTION

The traditional view of the duties of an excess insurer is that it owes no obligation to defend or indemnify its insured unless and until any retained limit and the limits of any primary or other underlying insurance have first been "exhausted" by the payment of claims, judgments, or settlements.<sup>i</sup> As a result, excess insurers typically experience a far lower frequency of claims and incur far lower defense costs and other loss adjustment expenses than do primary insurers. That is why excess insurance is typically so much less expensive than primary. The different pricing structures of primary and excess insurance, and the reasons for them, have been explicitly recognized by a number of courts.<sup>ii</sup>

Notwithstanding the general rule, insureds and primary and excess insurers have differed sharply over what constitutes "exhaustion" of primary limits. The drafters of excess policies almost certainly intended *exhaustion* to mean the actual payment of losses, through satisfaction of judgments or settlements of claims, but policyholders frequently argue — and courts have sometimes found — that the exhaustion requirement is ambiguous.<sup>iii</sup> Such an issue arises when a primary insurer settles part of a claim by paying less than its full policy limits; might such a partial settlement constitute "exhaustion" of the primary, sufficient to trigger the excess carrier's policy? As with so many other conundrums of insurance law, the answer is a resounding "maybe." Consider two hypothetical cases:

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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**Case A:**

An insured is sued in a personal injury action. Its primary insurer undertakes to defend the action, but the excess carrier disclaims coverage. The insured and its primary carrier enter into settlement negotiations with the plaintiff, but the excess carrier refuses to participate in those discussions. The insured and primary carrier reach an agreement with the plaintiff, according to which (a) the primary carrier pays the plaintiff \$46,500 of its \$50,000 policy limit, and (b) the plaintiff executes a partial release in favor of the insured, releasing the insured from any liability not covered by its excess insurance, and specifically reserving the plaintiff's rights to attempt to collect any award in excess of \$50,000 from the disclaiming excess insurer's policy.

**Case B:**

After a fatal accident, and in anticipation of litigation, the prospective defendant's primary liability insurer (with a *per* occurrence limit of \$100,000) makes the following pre-suit settlement with the wrongful death claimant: (a) the primary insurer pays the claimant \$70,000 out of its \$100,000 limit, (b) the claimant releases the insured from making any further payment — other than from the insured's excess insurance policy — as a result of any judgment that might be entered in the anticipated wrongful death suit, and (c) in the event of a judgment in excess of \$100,000 in the anticipated wrongful death suit, the insured and its excess carrier are to receive a credit in the amount of the full \$100,000 primary limit. The insured's excess carrier (with a \$1,000,000 limit) is aware of and participates in the negotiations, but is not a party to the agreement. Instead, the excess carrier explicitly reserves its right to contend that it has no liability. The claimant then files a wrongful death suit, which is "defended" by the primary carrier. The "defense" consists of consenting to entry of a judgment for plaintiff in the amount of \$150,000. The plaintiff thereafter looks to the excess carrier to satisfy the \$50,000 of the agreed judgment in excess of the \$100,000 primary limits.

In Case A, many would see no problem in finding that the primary policy's limits had been exhausted by the settlement, despite the fact that the primary carrier did not actually pay its entire limit in cash. That was, in fact, the result in one case.<sup>iv</sup> Case B, however, is another matter.

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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In Case B, the insured and primary insurer colluded with the plaintiff to "set up" the excess carrier. The apparent intent was for the plaintiff and defendant to avoid all litigation risk, the primary carrier to save thirty percent of its policy limits and avoid defense costs, and the excess carrier to be stuck with a judgment after a sham defense. Not surprisingly, in a case on those facts, it was held that the primary carrier's settlement extinguished any potential liability of the excess carrier.<sup>v</sup>

Several reported cases deal with the same basic legal issue: whether a partial settlement of a claim for less than the primary carrier's limits may constitute "exhaustion" of those limits, at least for the purpose of triggering an excess insurer's indemnity obligation. The two cases posited above are at polar extremes of the issue, but there are numerous possible permutations between the relatively innocent settlement approved in the first example and the transparent conspiracy criticized in the latter case. Whether such partial settlements are enforced as intended depends on both the specific terms of the settlement agreement and other aspects of the forum's general body of insurance law.

## *II. Zeig v. Massachusetts Bonding*

The seminal case in this area is *Zeig v. Massachusetts Bonding & Insurance Co.*<sup>vi</sup> In *Zeig*, the insured had \$15,000 in primary burglary (*i.e.*, first-party property) insurance, underlying a \$5,000 excess burglary policy.<sup>vii</sup> The insured sustained a covered burglary loss valued in excess of \$15,000.<sup>viii</sup> After negotiations, the primary insurer and insured reached a compromise partial settlement of the loss, according to which the primary carrier paid the insured a total of \$6,000 in complete satisfaction of the first \$15,000 of his loss.<sup>ix</sup> The insured then made claim on the excess insurer for so much of the loss as exceeded \$15,000.<sup>x</sup> The excess policy in *Zeig* provided in part that:

In consideration of the reduced premium charged for the policy to which this indorsement is attached, such policy is issued and accepted:

1. As excess and not contributing insurance, and shall apply and cover only after all other insurance herein referred to *shall have been exhausted in the payment of claims to the full amount of the expressed limits of such other insurance.*<sup>xi</sup>

The excess carrier argued that the quoted language provided that its policy was triggered only after the primary policy had first actually paid its limits, in real dollars, to the policyholder in satisfaction of claims. The Second Circuit disagreed, describing the excess insurer's interpretation as "unnecessarily stringent." The court perfunctorily acknowledged, in a passage much-quoted by excess insurers in later cases, that a clear and unambiguous policy provision requiring actual cash payment of underlying policy limits as a condition precedent of the excess insurer's liability would be enforceable: "It is doubtless true that the parties could impose such a condition precedent to liability upon the policy, if they chose to do so." However, the court found no such condition in the excess policy before it:

Nothing is said about the 'collection' of the full amount of the primary insurance. \* \* \*

The claims are paid to the full amount of the policies, if they are settled and discharged, and the primary insurance is thereby exhausted. There is no need of interpreting the word 'payment' as only relating to payment in cash. It often is used as meaning the satisfaction of a claim by compromise, or in other ways.<sup>xii</sup>

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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It is not clear whether the court found the excess policy language ambiguous, and construed it against the excess insurer, or whether it felt the plain meaning of the exhaustion provision simply did not support the excess insurer's position.<sup>xiii</sup>

Then, in an observation much-quoted by primary insurers in these cases, the court observed that the excess insurer:  
had no rational interest in whether the insured collected the full amount of the primary policies, so long as it was only called upon to pay such portion of the loss as was in excess of the limits of those policies. \* \* \* To require an absolute collection of the primary insurance to its full limit would in many, if not most, cases involve delay, promote litigation, and prevent an adjustment of the disputes which is both convenient and commendable.<sup>xiv</sup>

The reasoning of *Zeig* has been readily accepted by some courts and commentators,<sup>xv</sup> but should not be followed uncritically. For one thing, the court's opinion is rather short on specifics. It would be interesting to know, for instance, why the insured was willing to compromise the underlying \$15,000 in coverage for only \$6,000 (40% of the primary limit), what was the dollar value of the insured's total claim, whether the excess insurer was aware of or had an opportunity to participate in the negotiations between the insured and its primary insurers, and so forth.

Moreover, *Zeig* dealt with first-party property coverage, and it is dangerous to import its reasoning uncritically into cases dealing with third-party liability coverages, in which the extra elements of adverse third-party claimants and contractual defense obligations are present. In addition, excess property insurers are not bound by the loss adjustments of underlying primary

property insurers in the same way or to the same extent as excess casualty insurers are bound by adverse judgments in cases defended by underlying primary insurers.

Further, *Zeig* was decided in pre-*Erie v. Tompkins*<sup>xvi</sup> days, and represents what was once called federal common law, rather than the law of any particular state. Finally, the Second Circuit's interpretation of (or finding of ambiguity in) the *Zeig* excess policy's requirement that underlying policies "shall have been exhausted in the payment of claims to the full amount of the expressed limits of such other insurance" is unpersuasive.

### III. *Zeig's* Progeny

A number of courts have either followed or reached results similar to *Zeig, supra*, in third-party liability contexts.<sup>xvii</sup> It is no accident that most of those cases were decided under the laws of the "direct action" states of Louisiana and Wisconsin.

*Gasquet v. Commercial Union Insurance Co.*<sup>xviii</sup> was a negligence action for personal injuries sustained in a boating accident. The plaintiff sued both the alleged tortfeasor and, as Louisiana is a direct action jurisdiction,<sup>xix</sup> the tortfeasor's insurers. Before trial, plaintiff, defendant, and the primary carrier settled all claims against Commercial Union (the primary carrier) for a payment of \$200,000.<sup>xx</sup> As part of the settlement agreement, the plaintiff granted the excess carrier, Stonewall, a credit of \$300,000 (the amount of Commercial Union's primary policy limit) against any judgment that might be rendered against Stonewall.<sup>xxi</sup> The settlement agreement also released the insured from any liability for damages that might be collected from him directly, but excluded from the release any liability that would be covered by Stonewall's excess policy.<sup>xxii</sup> Stonewall was not a party to the settlement agreement. Because Commercial

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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Union, Stonewall, and the insured were all defendants in the action, they were all represented by counsel.<sup>xxiii</sup>

Stonewall argued that, because the underlying primary limit of \$300,000 had not been actually paid by either the insured or Commercial Union, Stonewall could have no liability under its excess policy.<sup>xxiv</sup> The court rejected Stonewall's position, for a number of reasons. The court began by recognizing that the intent of the parties to the settlement agreement was not to settle the entire case as against all parties, but only to settle the claims against some of the parties, and to reserve all of the plaintiff's rights against the excess carrier (which was itself a party to the action).<sup>xxv</sup> Next, the court observed that the settlement with the primary insurer was of no legal consequence to the excess insurer, because the excess carrier's liability had been fixed as of the time of the accident pursuant to Louisiana's direct action statute.<sup>xxvi</sup> Further, since it is the policy of the law to favor settlements — including partial settlements against less than all defendants — there was no policy reason to prohibit proceeding against the excess insurer, giving it credit for the policy limits of the settling primary insurer.<sup>xxvii</sup> The partial release of the insured was also of no consequence because the insured remained liable for amounts covered by the excess policy and, under Louisiana's direct action statute, the insured was not even a necessary party to the action.<sup>xxviii</sup>

Following *Zeig*, the court implicitly held that "payment" of primary limits does not mean only payment in cash.<sup>xxix</sup> Finally, the court held the reasoning of such cases as *United States Fire Insurance Co. v. Lay*<sup>xxx</sup> inapplicable under Louisiana jurisprudence, because under that state's direct action statute an insurer does not merely indemnify a tortfeasor for liability imposed on it by law or assumed by contract, but is itself directly and independently liable to an injured

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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plaintiff.<sup>xxxii</sup> Essentially the same reasoning was followed in each of the other Louisiana cases in this area.<sup>xxxiii</sup>

Another series of cases approving *Zeig* settlements was decided under the law of Wisconsin, another direct action jurisdiction.<sup>xxxiii</sup> The Wisconsin decisions in this area are consistent with the Louisiana decisions, but they also hold further that, in the absence of either a contract between them or an outright abandonment of the insured, a primary insurer owes no duty of good faith to an excess carrier covering the same loss and need not reimburse the excess carrier's expenses incurred in defending what remains of the claim after the primary company effects a partial settlement:

In respect, first, to the claim that [the excess carrier] has the right of recovery over for future expenses that may be incurred in the defense of its liability, it is clear that, by the provisions of [the excess carrier's] own policy, that it had the right and duty to defend the lawsuit. This is an obligation that it contracted for and is entirely independent of any obligation that [the primary carrier] had to defend under its separate policy. But there was no contract between [the primary carrier] and [the excess carrier] that imposed any obligation on [the primary] to defend claims that arose, or might arise after it settled out, within the parameters of [the excess] coverage.<sup>xxxiv</sup>

The reasoning of the Wisconsin cases is partly based on the suggestion that a *Zeig* settlement may provide a benefit to the excess insurer if the insured is protected from any potential uninsured exposure in excess of applicable insurance limits, because then the excess insurer need not be concerned about any potential liability to its policyholder for a bad faith refusal to settle within its policy limits.<sup>xxxv</sup>

Justifying a *Zeig* settlement is clearly simpler in the few direct action jurisdictions, in which the insurers are themselves named defendants in the action and directly liable to a

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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prevailing plaintiff, so the judicial policy of permitting a plaintiff to settle against less than all named defendants is applicable. In direct action states the excess insurer is also represented by counsel in the action, and therefore incurs relatively little additional expense for defense costs if the primary insurer and insured settle out of the case, as compared to non-direct action states, in which the excess insurer usually incurs no defense costs so long as the primary insurer carries out its obligation to provide a good faith defense.

Nevertheless, partial settlements for less than primary limits have been held to constitute exhaustion in a number of jurisdictions in which there is no direct action statute.<sup>xxxvi</sup> The reasoning of such cases is roughly similar to that of the direct action state cases, and is best exemplified in *Deblon v. Beaton & Jersey Insurance Co.*<sup>xxxvii</sup>, in which the excess carrier

disclaimed coverage and refused to participate in settlement negotiations: [The excess carrier] argues that plaintiff is precluded [from pursuing the excess insurer for damages] because its liability under its policy is 'to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages,' and its insured cannot become 'legally obligated to pay' anything because of the covenant not to sue. Such a conclusion might be tenable if the policy was one of indemnity against loss, rather than insurance against liability. Under New Jersey law the distinction is clear, \* \* \* and there is a strong public policy in this State favoring the availability to injured persons of the liability insurance of those whose negligence is the cause of their plight. Furthermore, upon the happening of an accident an injured party acquires an interest in an insurance policy which may be available, and that construction of such policy should be adopted which will afford the widest possible coverage. Accordingly, the policy clause, 'legally obligated to pay,' cannot receive the narrow construction sought by [the excess carrier] \* \* \* . All that is required is a jury verdict of negligence and damages in excess of the primary coverage, with [the excess] retaining its right to a judicial determination on its disclaimer.

Meaningless technicalities aside, the public interest points toward resolution of the competing interests to permit plaintiff to settle claims against the assets of two of the three exposed entities [*i.e.*, the insured and its primary insurer] without releasing the third. The interest of a plaintiff is full compensation, and from his

viewpoint it makes no difference whether a recovery is paid by a tortfeasor, his primary insurance carrier, his excess carrier, or any combination of the three. Insurance, of course, is an instrument of social policy that victims of negligence be compensated, and such compensation is in the public interest. The interest of defendant tortfeasors is to conclude the case within the limits of their insurance coverage. \* \* \* Since a carrier has a duty to act in good faith where its interests conflict with those of the insured in connection with settlement negotiations, it certainly cannot complain about the partial settlement, as in the present case, after disclaiming and refusing to negotiate at all.<sup>xxxviii</sup>

It is also easier to justify a *Zeig* settlement in jurisdictions in which a primary carrier owes no direct duty of good faith to an excess carrier insuring the same loss, and so the excess will not be heard to complain that its interests have been abandoned by the primary insurer.<sup>xxxix</sup>

#### IV. Cases Rejecting *Zeig*

Notwithstanding the reasoning of the above cases, a number of courts have explicitly rejected reliance on *Zeig*.<sup>xi</sup> The most oft-cited case rejecting *Zeig* is *United States Fire Insurance Co. v. Lay*,<sup>xii</sup> the basic facts of which are set out as Case B, above. The basic issue as framed by the Seventh Circuit in *Lay* was:  
the liability of an excess public liability insurance carrier when the personal injury claimant has settled with the insured and the primary carrier for less than the amount of the primary coverage. [We agree with the excess carrier] that the excess carrier's liability was extinguished by the settlement.<sup>xiii</sup>

A major problem with the settlement agreement in *Lay* was the fact that it effectively released the insured from *any* potential liability beyond the \$70,000 paid by the primary carrier. Based on its analysis of the excess policy's insuring agreement and definition of *ultimate net loss*, the Seventh Circuit held that the general release of the insured completely removed the unsatisfied judgment from the coverage of the excess policy:  
[T]he excess carrier is liable only if and when the insured sustains a loss in excess of the retained limit of \$100,000 by reason of liability imposed by law or assumed by contract. No such loss was ever sustained by [the insured]. It was effectively

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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released from all liability in excess of \$70,000 by the settlement agreement executed before the action against it was commenced. The agreed judgment did not purport to impose liability on [the insured]. *Because [the insured] was not and could not be liable for any amount in excess of \$100,000, the obligation of the excess carrier to indemnify [the insured] never arose.*

It is argued on behalf of the administratrix that the excess policy is not a true indemnity policy because it does not require that the insured actually pay the judgment before liability attaches. Whether or not the policy is one of indemnity in the technical sense, it is in substance a contract for indemnity against liability. The obligation to pay does not arise until the insured becomes liable. The excess carrier has no obligation whatsoever unless and until the insured becomes liable.<sup>xliii</sup>

Relying on *Zeig*, the claimant in *Lay* argued that partial satisfaction of the judgment by agreement and compromise constituted "payment" of the insured's retained limit and therefore triggered the excess policy.<sup>xliv</sup> The court rejected the applicability of *Zeig*, as follows: The short answer is that the condition [requiring exhaustion of underlying limits] becomes applicable only when there is coverage. Because the insured never became liable for an amount exceeding \$100,000, there is no coverage. It is therefore immaterial whether, if there had been coverage, the underlying carrier would be considered to have 'paid the amount of retained limit.'<sup>xlv</sup>

The Seventh Circuit also explicitly recognized that the defense obligation of a third-party liability insurer made the reasoning of *Zeig* inapplicable to the case before it: We can conceive of good reasons for an excess carrier to be unwilling to accept liability unless the amount of the primary policy has actually been paid. A settlement for less than the primary limit that imposed liability on the excess carrier would remove the incentive of the primary insurer to defend in good faith or to discharge its duty to represent the interests of the excess carrier. Here the primary insurer had no incentive whatsoever to reach a settlement at a figure between \$70,000 and \$100,000. Moreover, the settlement agreement terminating [the insured's] liability to the administratrix made her subsequent wrongful death action against [the insured] a sham. Neither [the insured] nor the primary insurer, which purported to defend the action, had any interest whatsoever in the outcome.<sup>xlvi</sup>

That the wrongful death action and resulting agreed judgment were transparent shams and a calculated imposition on the excess carrier, undoubtedly played a large part in the court's

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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thinking in *Lay*. Any partial settlement that insulates the insured and primary insurer from any further liability is very likely to diminish the zeal with which they defend the action.<sup>xlvii</sup>

In *Wright v. Newman*,<sup>xlviii</sup> the reasoning of *Zeig* was *apparently* (but not actually) rejected. *Wright* was a garnishment action brought against excess insurer Mission, to collect the unsatisfied portion of a judgment in a wrongful death action.<sup>xlix</sup> Mission's policy was a \$2,500,000 specific excess policy, written to be in excess of two specifically identified underlying policies with total limits of \$500,000.<sup>l</sup> The two underlying policies were validly cancelled shortly before the subject accident and never paid or defended *any* part of the claim, let alone being "exhausted."<sup>li</sup>

Shortly before trial, the parties entered into a settlement agreement whereby a co-defendant's primary insurer (Commercial Union, under whose policy Mission's insureds were additional insureds) paid plaintiffs \$300,000, representing its primary policy limits, and plaintiffs agreed to forego satisfaction of any subsequent judgment from defendants' personal assets, but reserved their rights to pursue recovery from the Mission excess policy.<sup>lii</sup> (A Missouri statute allowed persons having an unliquidated claim for damages against a tortfeasor to limit execution upon any subsequently obtained judgment to a specified asset or fund of insurance.<sup>liii</sup>)

At trial, Mission's insureds waived personal appearance and their right to a jury trial.<sup>liv</sup> After two days of testimony, the court (without a jury) entered judgment in favor of plaintiffs in the aggregate amount of \$5,775,000.<sup>lv</sup> No post-trial motion was made or appeal taken, and the garnishment action followed.<sup>lvi</sup> The judgment creditors sought to collect, not merely that part of the judgment in excess of the underlying limits up to Mission's excess policy limit of \$2.5

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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million, but also *the entire* unsatisfied \$5,775,000 judgment, on the theory that Mission was guilty of a bad-faith refusal to settle.<sup>lvii</sup> Plaintiffs argued that the court should ignore Mission's excess policy provision requiring exhaustion of the specific underlying policies, citing *Zeig's* language that an excess insurer "has no rational interest in whether the insured collected the full amount of the primary policies, so long as it [the excess insurer] was only called upon to pay such portion of the loss as was in excess of those policies."<sup>lviii</sup>

The court rejected such reliance on *Zeig*:  
I do not believe *Zeig* can be applied in a situation where — as in this case — the policy contains an express provision requiring resort to underlying insurance.  
Furthermore, in the present case it would seem that Mission does in fact have a 'rational interest' in having its policy read literally in this respect. Plaintiffs here seek to garnish not simply the Mission policy limits themselves (\$2,500,000), but an amount equal to the entire unpaid portion of their judgment (\$5,475,000). \* \* \*  
\* Mission has, in these circumstances, a 'compelling' interest' in enforcing the policy provisions in question. In addition, since the underlying insurers have a duty 'to defend in good faith ... [and] to represent the interests of the excess carrier,' to ignore the policy provisions in question would effectively deprive Mission of a material benefit for which it implicitly bargained when it undertook the risk of excess coverage. \* \* \* '[I]nsurance which is subject to an "excess" provision does not qualify as valid and collectible insurance ... until the limits of the primary policies have been exhausted.' \* \* \* The essential principle is simply that an unambiguous excess policy provision is entitled to be enforced as written.<sup>lix</sup>

A similar case is *Johnson v. Milgo Industrial, Inc.*,<sup>lx</sup> in which the insured was required by the terms of an excess liability policy to maintain \$250,000 in underlying bodily injury liability insurance, but failed to do so.<sup>lxi</sup> The insured suffered a large judgment, of which \$140,000 plus interest remained unsatisfied after a co-defendant's insurer had paid its full policy limits.<sup>lxii</sup> Counting the insured's liability over to that co-defendant, the insured's ultimate net loss was \$252,330 plus interest.<sup>lxiii</sup> The insured and plaintiff/judgment creditor, citing *Zeig*, both claimed

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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that the excess insurer was required to pay either that amount, or at least the unsatisfied \$140,000 part of the judgment.<sup>lxiv</sup> The court rejected such reliance on *Zeig*:  
*Zeig* is no authority for revision of [an express contractual provision regarding exhaustion of underlying primary limits] if the [excess] insurer had a rational interest in having its provisions read literally.<sup>lxv</sup>

The result was that the excess insurer was required to pay only \$2,330: the amount it would have been required to pay had the insured maintained the required \$250,000 of underlying insurance.<sup>lxvi</sup>

Note that *Wright v. Newman*<sup>lxvii</sup> and *Johnson v. Milgo Industrial*<sup>lxviii</sup> are not true rejections of *Zeig*, since neither involved a partial settlement by an underlying insurer that paid less than its full policy limits (which was the situation in *Zeig* and its progeny). Rather, in both *Wright* and *Johnson* the insured failed to maintain specifically required underlying insurance. In each case, what the insured and plaintiff proposed was, in effect, that the excess insurer drop down and stand in the shoes of the absent underlying insurers. What the court in each case rejected was not the actual holding of *Zeig*, but an argument (based on language taken out of its context in *Zeig*) that an excess insurer "ha[s] no rational interest in whether the insured collected the full amount of the primary policies, so long as it was only called upon to pay such portion of the loss as was in excess of the limits of those policies."<sup>lxix</sup>

Although both *Wright* and *Johnson* purport to reject *Zeig*, they actually reach similar results. In each case, the excess insurer was first given credit for the insured's non-existent underlying insurance and was then made to pay the amount that exceeded the underlying limit, *as if* an underlying insurer existed and had paid its full underlying limit. What the plaintiff and

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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insured proposed in each case was not really a partial settlement *à la Zeig*, but that the excess insurer drop down and stand in the shoes of an *absent* primary insurer.

The most recent decision to reject *Zeig* is *Federal Ins. Co. v. Srivastava*.<sup>lxx</sup> There, an insurance program consisting of a primary and four excess layers was impaired by the insolvency of the first and second excess carriers.<sup>lxxi</sup> Federal Insurance provided the uppermost layer of coverage (\$30 million excess of \$22 million).<sup>lxxii</sup> The insured suffered an adverse \$31.6 million judgment involving all layers of coverage.<sup>lxxiii</sup> After the verdict, the plaintiff offered to settle for \$21 million, which was below the attachment point of Federal's policy.<sup>lxxiv</sup> The insured demanded that Federal participate in the settlement discussions and contribute to a settlement.<sup>lxxv</sup> Federal, interpreting that as a demand that it drop down because of the insolvency of underlying carriers, refused to participate in such a settlement, but agreed to participate in appealing the judgment, subject to a reservation of rights it had interposed before verdict.<sup>lxxvi</sup> The settlement talks continued without Federal's participation, resulting in a settlement in which the plaintiff, in return for a total payment of \$8.5 million from the insured and its other insurers, agreed to release the insured's liability for the first \$22 million of the judgment, but reserved the right to collect the balance of the judgment -- more than \$9 million -- from Federal.<sup>lxxvii</sup>

As a result of the settlement, the insured lost interest in pursuing its appeal.<sup>lxxviii</sup> Federal demanded that the insured continue to prosecute the appeal, but the insured refused to do so unless Federal waived its reservation of rights and unequivocally acknowledged its obligation to pay the amount of any affirmed judgment in excess of \$22 million.<sup>lxxix</sup> Federal refused, so the insured dismissed the appeal.<sup>lxxx</sup> Federal then sought a declaratory judgment of the parties' rights and obligations under its policy.<sup>lxxxi</sup>

The judgment creditor and policyholder predictably relied on *Zeig* to support their settlement agreement and fix liability on Federal.<sup>lxxxii</sup> The Fifth Circuit roundly rejected *Zeig* and its reasoning in the context of a casualty policy, stating:

\* \* \* [In *Zeig*,] Judge Hand assumed that the insured's loss was fixed before any settlement with the primary insurers. With the loss set, there was little danger that primary insurers could, contrary to the contracted-for risk, shift any part of their burden to excess carriers. With a burglary of property, the insured loss was established. A defendant may liken a judgment on a jury verdict to burglary or robbery -- fashionable hyperbole. Yet the insured defendant has not realized a loss. \* \* \* We are not persuaded that the nominal value of the extinguished portion of the judgment establishes the loss. Rather, [the policyholder's] loss is determined by the actual value of the settlement with [the plaintiff] -- which includes both the amounts payable by the settling parties and the unextinguished portion of the judgment. That loss does not reach the threshold of Federal's excess policy. This does not mean that underlying insurers must actually pay before excess policies are triggered. It means that their obligation to do so must be finally determined. \* \* \* Since the insured's loss does not reach the layer of Federal's coverage, Federal has no liability.<sup>lxxxiii</sup>

## V. Settlement Post-*Zeig*

An excess insurer normally has the right to make its own independent evaluation of a case, and to refuse in good faith to participate in what it considers an ill-advised or unsatisfactory settlement, notwithstanding the urgings of other insurers.<sup>lxxxiv</sup> When a claimant, insured, and primary insurer want to settle a claim, but an excess carrier's evaluation of the claim precludes complete settlement, then the reasoning of *Zeig* and its progeny allows them simultaneously to effect a partial settlement and purport to preserve the excess insurer's right to refuse to settle.

The parties to a *Zeig* settlement benefit in a variety of ways. The insured gets protection from the possibility of liability in excess of its applicable insurance. The primary insurer saves

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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part of its primary limits, protects its insured, and may also cut short its defense obligation (see *infra*). The plaintiff gets an immediate infusion of cash, reduces its litigation risk, sows disharmony among the defendant's insurers, and may demoralize both defense counsel and non-settling excess insurer(s).

Although only a very few courts have squarely addressed the issue, most of those to have done so have held that, under certain circumstances, a primary insurer's partial settlement of a claim by payment of less than its full policy limits can constitute exhaustion of the primary policy for purposes of triggering the obligations of an excess insurer. Most such decisions have been based, at least in part, on direct action statutes, pursuant to which an insurer is a named defendant in the action, directly liable to the injured plaintiff, and the insured tortfeasor is not even a necessary party. The remainder have been premised, at least in part, on the view that an underlying primary insurer either owes no duty of good faith to an excess insurer covering the same risk, or owes at most only a duty not to act in bad faith so as to shift a loss from primary to excess, but owes no duty to defend the interests of the excess insurer. It remains to be seen whether settlements *à la Zeig* will be widely held to constitute exhaustion of primary limits in jurisdictions in which (a) there is no direct action statute and (b) primary insurers are held to owe a duty of good faith to excess insurers, either directly or by way of equitable subrogation.

Those courts that have given full effect to *Zeig* settlements have apparently been motivated by a number of considerations, foremost among them the judicial policy of encouraging settlements, even partial settlements (judges know that partial settlements often beget complete settlements). Courts have also been impressed by the fact that the primary carrier's partial settlement of the claim benefits the insured by protecting the insured's assets

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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from the threat of potential uninsured liability (although that benefit might just as readily be obtained if the primary were to pay its *full* policy limit). Courts have also relied on the observation that *Zeig* settlements benefit even the excess insurer to some extent, by insulating it from any potential liability to the insured for bad faith failure to settle within its policy limits (although one might suspect that many excess insurers would gladly forego that putative benefit in order to keep the primary insurer actively involved in the defense of the claim). When a court is faced with a choice between furthering the best interests of a plaintiff and an insured on the one hand, or those of the insured's excess carrier on the other, one need not be a seer to predict that the excess carrier's interests are likely to take second place.

The foregoing suggests that any *Zeig* settlement should be based on the insured's agreement and participation, even if the primary insurer would normally have the right to settle within its limits without the insured's consent: it is important in a *Zeig* settlement that the insured be protected from any potential harm or loss (*e.g.*, the sudden evaporation of the primary's defense obligation, or the potential loss of the insured's excess coverage) as a result of such an arrangement. The primary insurer should see to it that any contemplated *Zeig* settlement provides that the insured will be protected from uninsured exposure to its own assets, and that the excess insurer(s) will be given a credit for the full, undiscounted amount of the primary limits and any applicable self-insured retention or deductible. In addition, the settling primary insurer should ensure that some provision is made for continuing the insured's defense for the remainder of the case.

Courts considering *Zeig* settlements also have been influenced by the fact that an excess insurer was aware of the primary carrier's settlement negotiations, and either had an opportunity

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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to participate in them or to conduct its own separate settlement talks. Sometimes such awareness has helped the excess carrier's legal position; in other instances, it has undercut it. In *United States Fire Insurance Co. v. Lay*,<sup>lxxxv</sup> the excess insurer's separate settlement talks with the plaintiff ended up helping the excess insurer, because the parties agreed to the excess insurer's reservation of the right to contest that it had any liability at all. In *Kelley Co., Inc. v. Central National Insurance Co. of Omaha*,<sup>lxxxvi</sup> however, the court relied on the fact that the excess carrier was representing its own interests in settlement negotiations and could have assumed the defense of the action after the primary settled, to characterize the settlement as fair to the excess.

A plaintiff or primary insurer contemplating a *Zeig* settlement should ordinarily invite participation by the excess, even if the excess has already denied coverage or indicated it has no interest in settling. If the excess participates in the negotiations, that will often make a complete settlement more likely than otherwise. If the excess participates, but no over-all settlement is reached, the parties to the *Zeig* partial settlement will at least be able to argue that they negotiated openly and honestly, on actual notice to the excess. If the excess refuses to participate at all, then the settling parties can try to argue that the excess thereby waived any dissatisfaction it might have with the partial settlement negotiated by the primary and is bound by its results.<sup>lxxxvii</sup> In jurisdictions where the viability of *Zeig* settlements is unsettled (*i.e.*, in the vast majority of states), parties contemplating such a settlement should consider trying to have the settlement approved in advance by the court, either as part of the main action or in a related declaratory judgment action.

The worst thing the settling parties can do is to negotiate a partial settlement without advising the excess carrier, then continue with the case and present the excess carrier with a

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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substantial judgment as a *fait accompli*; that scenario is much too much like the sham defense criticized in *Lay*, and might result in voiding the excess coverage.<sup>lxxxviii</sup> Similarly, the insured's deliberate abandonment of an appeal because of the excess carrier's refusal to surrender its carefully reserved legal rights plainly played a role in the Fifth Circuit's recent decision in *Federal Ins. Co. v. Srivastava*.<sup>lxxxix</sup>

Although plaintiffs and primary insurers might sometimes find *Zeig* settlements mutually beneficial, excess insurers naturally tend to view them unfavorably. Notwithstanding the reasoning of *Zeig* and its progeny, an excess casualty insurer clearly suffers at least three types of disadvantage whenever an underlying insurer effects a *Zeig* settlement: (1) the excess loses the benefit of that underlying insurer's defense of the claim; (2) in negotiating a settlement, the excess loses the benefit of so much of the primary limits as was not actually paid; and (3) the excess is confronted with substantially increased opportunities for collusion between the insured, primary carrier, and plaintiff. As to the first of those items, excess insurers point out that their policy limits stand in the place of the insured's assets and, if there were no excess insurance, the primary insurer would never be permitted to compromise its liability for less than policy limits, assert it had thereby "exhausted" its policy, and turn over all further defense costs to the insured.

Even if the underlying insurer continues to defend the claim after reaching a partial settlement, it will have no further stake in the outcome of the case. Few excess insurers will be content to rely on such a disinterested primary carrier to put up a zealous defense: even if the underlying insurer fully intends to live up to its defense obligations, its heart just will not be in it. For example, in *U.S. Fire Ins. Co. v. Lay*<sup>xc</sup> and *Wright v. Newman*,<sup>xcii</sup> the insureds and primary insurers abandoned any pretense of a vigorous, good-faith defense, and in *Futch v. Fidel. & Cas.*

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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*Co. of New York*,<sup>xcii</sup> the insured refused even to appear at trial to assist the excess carrier's defense. The *Zeig*-type settlement agreements quoted in the reported cases generally do not address *post*-settlement residual defense obligations, suggesting that the subject either received no attention from the litigants, was dealt with *sub rosa*, or was deliberately reserved for resolution on another day.

Excess insurers justifiably complain that a primary insurer's settlement for less than its full policy limits prematurely exhausts the primary's defense obligation, and thereby accelerates the excess insurer's defense obligation (if any), thus prematurely shifting defense costs and other loss adjustment expense from the primary to excess layers. Even where the excess policy specifically excludes any defense obligation, a *Zeig* settlement effectively forces the excess insurer to assume an expensive defense obligation it was never asked or intended to bear, because the policyholder and primary insurer no longer have any interest in defending the claim. One court has imposed a solution that might partially solve that particular problem. In *Allstate Ins. Co. v. Riverside Ins. Co. of North America*,<sup>xciii</sup> the court approved a *Zeig* settlement, but permitted the non-settling excess carrier to control the defense going forward, *at the primary insurer's expense*.<sup>xciv</sup> To effect such an arrangement by contract, as opposed to court order, would require substantial trust between the primary and excess insurers, perhaps more trust than is reasonably available in many instances. Also, requiring the primary insurer to keep paying the costs of defense after it has settled would in most cases drastically curtail its incentive to settle at all.

Apart from the loss of the benefit of the primary's further defense of the claim, the excess insurer also loses the negotiating benefit of so much of the underlying layer of insurance as was

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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not actually paid to the plaintiff. Since that layering was a major consideration in the excess insurer's underwriting and pricing, and since the insured got the benefit of that layering in the form of a lower premium for the excess coverage, excess insurers are justifiably put out at such a result.

The reality is that a "credit" for the unpaid portion of the primary limits does not put the excess insurer in the same negotiating position it would have occupied had the primary actually paid its full limits. That is because plaintiffs do not negotiate settlements for credits, but only for dollars. For example, let us take a plaintiff who has decided his rock-bottom settlement position is \$500,000: that is the lowest amount he is willing to accept in complete disposition of the claim. The plaintiff then gives the primary insurer a \$25,000 credit on its \$100,000 policy limits, taking \$75,000 from the primary in a *Zeig* settlement. When the time comes to negotiate with the excess carrier, the plaintiff's rock-bottom settlement demand on the excess will not be \$400,000, but \$425,000. The excess carrier, if it wants to settle the claim, must now pay the plaintiff \$25,000 more than it would have had to do if the primary had slaked the plaintiff's thirst for damages to the extent of its full \$100,000 policy limit, instead of only \$75,000.

The net effect is to shift \$25,000 of the loss (not counting loss adjustment expense) from the primary insurer (which charged the insured a relatively high premium because it was to be primary) to the excess (which charged the insured a relatively low premium because it was to be excess of the primary's full policy limits). The \$25,000 "credit" will be of no benefit to the excess insurer unless and until the case is tried to a plaintiff's verdict, and the credit is then deducted from the amount of the award.

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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When that argument was raised by the excess insurer in *Kelley Co., Inc.*<sup>xcv</sup>, the court's unsympathetic (and unrealistic) response was to the effect that the excess carrier should either have negotiated better than it did, or else have taken the case to trial and tried to get a better result from a jury.<sup>xcvi</sup> However, it is not clear why an excess insurer should be required to try a case to verdict, rather than settle it, in an attempt to cure the prejudice imposed on it by an underlying carrier's *Zeig* settlement.

Excess insurers also complain that permitting *Zeig* settlements will create new opportunities for collusion among plaintiffs, policyholders, and underlying insurers, all to the detriment of excess insurers. Based on a knowledge of human nature and the realities of litigation, that prediction will doubtless seem intuitively obvious to most practitioners, and it receives inferential confirmation from the facts of such cases as *U.S. Fire Insurance Co. v. Lay*,<sup>xcvii</sup> *Wright v. Newman*,<sup>xcviii</sup> *Futch v. Fidel. & Cas. Co. of New York*,<sup>xcix</sup> and *Federal Ins. Co. v. Srivastava*.<sup>c</sup> Some courts, although recognizing that such opportunities may be created, nevertheless hold that fraud and collusion are possible in any transaction, and that excess insurers have adequate remedies in the "cooperation" clauses of their excess policies and the possibility of disclaiming liability if such collusion is established.<sup>ci</sup> Excess insurers would do better to argue that a *Zeig* settlement does not merely create an opportunity for collusion to the prejudice of the excess carrier, it is itself the **consummation** of such collusion.

Excess insurers wishing to contest the effects of a *Zeig* settlement<sup>cii</sup> should insist that the "credit" is a transparent fiction, and that the excess policy is not triggered unless and until the unpaid balance of the primary limits has been actually paid by either the primary insurer or the policyholder. They should also argue that a *Zeig* settlement is designedly and inherently nothing

more than a scheme for shifting a loss from underlying to excess insurers, which runs counter to the entire idea of layered insurance programs. Excess insurers should also carefully reserve their rights to make their own independent, good-faith claim evaluations, and characterize *Zeig* settlements as attempts to unfairly burden that right.

## VI. CONCLUSION

Excess insurers should be aware that courts considering the validity of *Zeig* settlements will be heavily influenced by self-interest: *i.e.*, the universal judicial impulse to promote settlements, avoid trials, conserve judicial resources, and clear judicial calendars. Excess insurers will have to muster their best arguments and most persuasive advocates to overcome courts' strong desire to promote settlements.

Like most legal fictions, *Zeig* settlements raise ancillary legal issues. If such a settlement "exhausts" primary policy limits for purposes of triggering an excess policy, is the primary policy to be deemed "exhausted" for other purposes too? Specifically, if the primary insurer was also defending the policyholder against other claims under the same policy, may it now immediately stop defending those other claims, since its policy has been "exhausted" by the partial settlement? If other claims arise during the primary policy's coverage period, need the primary insurer respond at all, if its policy has been "exhausted" in a *Zeig* settlement? *Zeig* settlement agreements are generally silent as to such ancillary issues, inviting further litigation in the area in the future.

## Notes

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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- i. See, e.g., *Thomson National Press Co. v. National Union Fire Ins. Co.*, 16 Mass.App. 242, 451 N.E.2d 432 (1983); *Eisenhower Hospital Osteopathic v. Taylor*, 43 Colo.App. 498, 609 P.2d 1114 (1979); *Molina v. United States Fire Ins. Co.*, 574 F.2d 1176 (4th Cir. 1978); *Smith v. Government Employees Ins. Co.*, 558 P.2d 1160 (Okla. 1976); *Safeco Ins. Co. v. Ins. Co. of North America*, 522 S.W.2d 867 (Tenn. 1975); *Liberty Mutual Ins. Co. v. Truck Ins. Exchange*, 245 Or. 30, 420 P.2d 66 (1966); see generally, COUCH ON INSURANCE 2D (Rev. ed.) § 62:48; Rhodes, THE LAW OF COMMERCIAL INSURANCE 128 (1992).
- ii. See, e.g., *Federal Ins. Co. v. Srivastava*, 2 F.3d 98 (5th Cir. 1993); *Ambassador Associates v. Corcoran*, 168 A.D.2d 281, 562 N.Y.S.2d 507 (1st Dept. 1990), *aff'd*, 79 N.Y.2d 871, 581 N.Y.S.2d 276 (1992); *Whitehead v. Fleet Towing Co.*, 110 Ill.App.3d 759, 442 N.E.2d 1362 (Ct. App. 1982); *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126 Cal.App.3d 593, 178 Cal.Rptr. 908 (Ct. App. 1981); *Valentine v. Aetna Ins. Co.*, 564 F.2d 292 (9th Cir. 1977); *Continental Cas. Co. v. United States Fidel. & Guar. Co.*, 516 F.Supp. 384 (N.D. Cal. 1981).
- iii. See, e.g., *Molina v. United States Fire Ins. Co.*, 574 F.2d 1176 (4th Cir. 1978) (policyholder argued that insolvency of underlying primary insurer constituted "exhaustion" of its policy, triggering excess).
- iv. *Deblon v. Beaton & Jersey Insurance Co.*, 103 N.J.Super. 345, 247 A.2d 172 (1968).
- v. *United States Fire Ins. Co. v. Lay*, 577 F.2d 421 (7th Cir. 1978).
- vi. 23 F.2d 665 (2d Cir. 1928)
- vii. *Id.*
- viii. *Id.*

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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- ix. *Id.*
- x. *Id.*
- xi. *Id.* (emphasis added).
- xii. 23 F.2d at 666.
- xiii. *Cf.*, *Stargatt v. Fidelity and Cas. Co. of New York*, 67 F.R.D. 689 (D. Del. 1975) ("The plain meaning of 'exhausted' is 'entirely used up,' and the coverage of the primary policy has been entirely used up by the settlement." 67 F.R.D. at 690).
- xiv. 23 F.2d at 666.
- xv. *See, e.g.*, Dunham (ed.), NEW YORK INSURANCE LAW § 39.07[2] (1992), and cases discussed *infra*.
- xvi. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938).
- xvii. *Teigen v. Jelco of Wisconsin, Inc.*, 124 Wis.2d 1, 367 N.W.2d 806 (1985); *Loy v. Bunderson*, 107 Wis.2d 400, 320 N.W.2d 175 (1982); *Kelley Co., Inc. v. Central National Ins. Co. of Omaha*, 662 F.Supp. 1284 (E.D. Wis. 1987); *Allstate Ins. Co. v. Riverside Ins. Co. of North America*, 509 F.Supp. 43 (E.D. Mich. 1981); *Gasquet v. Commercial Union Ins. Co.*, 391 So.2d 466 (La. Ct. App. 1980); *American Home Assurance Co. v. Commercial Union Assurance Co.*, 379 So.2d 757 (Ct. App. La., 1979); *United States Fidel. & Guar. Co. v. Safeco Ins. Co. of America*, 555 S.W.2d 848 (Mo. Ct. App. 1977); *Stargatt v. Fidel. & Cas. Co. of New York*, 67 F.R.D. 689 (D. Del. 1975); *Deblon v. Beaton and Jersey Ins. Co.*, 103 N.J. Super. 345, 247 A.2d 172 (N.J. Super. Ct. 1968); *Futch v. Fidel. & Cas. Co. of New York*, 246 La. 688, 166 So.2d 274 (1964); *Benroth v. Continental Cas. Co.*, 132 F.Supp. 270

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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(W.D.La. 1955).

xviii. *Gasquet v. Commercial Union Insurance Co.*, 391 So.2d 466 (La. Ct. App. 1980).

xix. L.A.R.S. 22:655.

xx. 391 So.2d at 468.

xxi. *Id.*

xxii. 391 So.2d at 470-471.

xxiii. The *Gasquet* opinion does not reveal who controlled the insured's defense, or whether the defense could be characterized as a sham.

xxiv. 391 So.2d at 470.

xxv. 391 So.2d at 471-472.

xxvi. *Id.*

xxvii. *Id.*

xxviii. *Id.*

xxix. *Id.*

xxx. 577 F.2d 421 (7th Cir. 1978).

xxxi. 391 So.2d 471-472.

xxxii. See *American Home Assurance Co. v. Commercial Union Assurance Co.*, 379 So.2d 757 (Ct. App. La. 1979); *Futch v. Fidel. & Cas. Co. of New York*, 246 La. 688, 166 So.2d 274 (1964); *Benroth v. Continental Cas. Co.*, 132 F.Supp. 270 (W.D. La. 1955) (excess policy had no explicit "exhaustion" requirement).

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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xxxiii. *Loy v. Bunderson*, 107 Wis.2d 400, 320 N.W.2d 175 (1982) (two primary policies, one with excess "other insurance" clause); *Teigen v. Jelco of Wisconsin, Inc.*, 124 Wis.2d 1, 367 N.W.2d 806 (1985); *Kelley Co., Inc. v. Central National Insurance Co. of Omaha*, 662 F.Supp. 1284 (E.D. Wis. 1987).

xxxiv. *Loy v. Bunderson*, 107 Wis.2d 400, 320 N.W.2d 175, 190 (1982).

xxxv. *Teigen v. Jelco of Wisconsin*, 124 Wis.2d 1, 367 N.W.2d 806, 810 (1985).

xxxvi. *Allstate Ins. Co. v. Riverside Ins. Co. of North America*, 509 F.Supp. 43 (E.D. Mich. 1981) (two primary personal auto policies, one excess by virtue of other insurance clause); *United States Fidel. & Guar. Co. v. Safeco Ins. Co. of America*, 555 S.W.2d 848 (Mo. Ct. App. 1977) (two primary personal auto policies, one excess by virtue of other insurance clause; settlement constituted exhaustion for purpose of requiring excess to pay portion of interest on judgment); *Stargatt v. Fidel. & Cas. Co. of New York*, 67 F.R.D. 689 (D. Del. 1975); *Zeig v. Massachusetts Bonding Co.*, 23 F.2d 665 (2d Cir. 1928); *Deblon v. Beaton & Jersey Insurance Co.*, 103 N.J.Super. 345, 247 A.2d 172 (1968) (two primary personal auto policies, one excess pursuant to other insurance clause).

xxxvii. 103 N.J.Super. 345, 247 A.2d 172 (N.J. Super. Ct. 1968).

xxxviii. 103 N.J.Super. at 350, 247 A.2d at 175 (citations omitted). Perhaps the most striking aspect of this decision is the court's dismissive reference to substantial disputes over the meaning and effect of insurance policy language as "meaningless technicalities," which are apparently to be "[put] aside" in order to further the "public interest [in] full compensation" for plaintiffs — and perhaps also to further the court's own self-serving interest in settling cases and clearing its docket.

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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xxxix. *See, e.g., Kelley Co., Inc. v. Central National Insurance Co. of Omaha*, 662 F.Supp. 1284 (E.D.Wis. 1987) (distinguishing between duties to defend and indemnify; as to duty to indemnify, primary owed excess duty not to act in bad faith, thereby shifting loss from primary to excess, and breach of that obligation may result in primary's liability to excess; court refused to find primary owed any defense obligation to excess, holding "[a] primary insurer will not be held liable to the excess carrier for breach of its independent duty to defend." 662 F.Supp. at 1287); *Deblon v. Beaton & Jersey Insurance Co.*, 103 N.J. Super. 345, 352, 247 A.2d 172, 176 (N.J. Super. Ct. 1968); *Allstate Insurance Co. v. Riverside Insurance Co. of America*, 509 F.Supp. 43, 46 (E.D. Mich. 1981).

xl. *United States Fire Insurance Co. v. Lay*, 577 F.2d 421 (7th Cir. 1978); *Wright v. Newman*, 598 F.Supp. 1178 (W.D. Mo. 1984); *Johnson v. Milgo Industrial, Inc.*, 458 F.Supp. 297 (D. Minn. 1978).

xli. 577 F.2d 421 (7th Cir. 1978).

xlii. 577 F.2d at 421.

xliii. 577 F.2d at 423 (emphasis added).

xliv. 577 F.2d 423.

xlv. *Id.*

xlvi. *Id.*

xlvii. *See Futch v. Fidel. & Cas. Co. of New York*, 246 La. 688, 166 So.2d 274 (1964) (after obtaining *Zeig* release, insured refused to attend trial to assist in excess insurer's defense); *Wright v. Newman*, 598 F.Supp. 1178 (W.D. Mo. 1984) (Colorado law; after *Zeig* settlement, insureds waived appearance at trial and right to jury; judgment for \$5,775,000 entered after

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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- two days' testimony).
- xlvi. 598 F.Supp. 1178 (W.D. Mo. 1984).
- xlv. 598 F.Supp. 1182.
- l. 598 F.Supp. at 1186-1189.
- li. *Id.*
- lii. 598 F.Supp. 1183.
- liii. *Id.*, n.4; MO.REV.STAT. § 537.065.
- liv. 598 F.Supp. 1183.
- lv. *Id.*
- lvi. *Id.*
- lvii. 598 F.Supp. at 1197 and n.11.
- lviii. 598 F.Supp. at 1197, quoting *Zeig v. Massachusetts Bonding and Insurance Co.*, 23 F.2d at 666.
- lix. 598 F.Supp. at 1197-98 (citations and footnotes omitted).
- lx. 458 F.Supp. 297 (D. Minn. 1978).
- lxi. 458 F.Supp. at 298.
- lxii. 458 F.Supp. at 297.
- lxiii. 458 F.Supp. at 300.
- lxiv. 458 F.Supp. at 300-301.
- lxv. 458 F.Supp. at 301.
- lxvi. 458 F.Supp. at 302.

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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lxvii. 598 F.Supp. 1178 (W.D. Mo. 1984).

lxviii. 458 F.Supp. 297 (D. Minn. 1978).

lix. *Zeig v. Massachusetts Bonding & Insurance Co.*, 23 F.2d at 666.

lxx. 2 F.3d 98 (5th Cir. 1993).

lxxi. 2 F.3d at 99-100.

lxxii. *Id.*

lxxiii. *Id.*

lxxiv. 2 F.3d at 100.

lxxv. *Id.*

lxxvi. *Id.*

lxxvii. 2 F.3d at 100-101.

lxxviii. 2 F.3d at 101.

lxxix. *Id.*

lxxx. *Id.*

lxxxi. *Id.*

lxxxii. 2 F.3d at 102.

lxxxiii. 2 F.3d at 103.

lxxxiv. *Keystone Shipping Co. v. Home Insurance Co.*, 840 F.2d 181 (3d Cir. 1988).

lxxxv. 577 F.2d 421 (7th Cir. 1978).

lxxxvi. 662 F.Supp. 1284 (E.D. Wis. 1987).

lxxxvii. One court has recently held that, when the excess carrier is insolvent, the issue is only

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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whether the state's guarantee fund has been triggered under its statutory scheme, and not whether the insolvent excess carrier can be characterized as "bound" by the partial settlement. *Aztec Well Servicing Co., Inc. v. Prop. & Cas. Insurance Gty. Assn. of the State of New Mexico*, No. 20-569 (Sup. Ct., N.M., May 10, 1993).

lxxxviii. *See also, Smith v. Government Employees Insurance Co.*, 558 P.2d 1160 (Okla. 1976) ("A settlement between an insurance company which is primarily liable and its insured, even though a full, final and complete settlement, does not affect the priority of payment, unless the amount of the settlement exhausts the policy limits. To hold otherwise would allow companies primarily liable to transfer liability by making token settlements. Such a holding would not give effect to the clear, unambiguous language of excess insurance clauses." 558 P.2d at 1162)

lxxxix. 2 F.3d 98 (5th Cir. 1993).

xc. 577 F.2d 421 (7th Cir. 1978).

xc. 598 F.Supp. 1178 (W.D. Mo. 1984).

xcii. 246 La. 688, 166 So.2d 274 (1964).

xciii. 509 F.Supp. 43 (E.D. Mich. 1981).

xciv. 509 F.Supp. at 48.

xcv. 662 F.Supp. 1284 (E.D. Wis. 1987).

xcvi. 662 F.Supp. at 1289.

xcvii. 577 F.2d 421 (7th Cir. 1978).

xcviii. 598 F.Supp. 1178 (W.D. Mo. 1984).

xcix. 246 La. 688, 166 So.2d 274 (1964).

**DOES A PARTIAL SETTLEMENT FOR LESS THAN  
FULL PRIMARY LIMITS TRIGGER THE EXCESS?  
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c. 2 F.3d 98.

ci. *Allstate Insurance Co. v. Riverside Insurance Co. of America*, 509 F.Supp. 43, 47-48 (E.D. Mich. 1981); *Deblon v. Beaton & Jersey Insurance Co.*, 103 N.J.Super. 345, 352, 247 A.2d 172, 176 (N.J. Super. Ct. 1968).

cii. Not all excess insurers will necessarily wish to contest such settlements. A company may be an excess insurer in some instances, but an underlying insurer in others. Such a company, feeling that turnabout is fair play, may look forward to using the same tactics to shift its own losses to upper excess layers in other cases.