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United States District Court In Texas Holds AXIS Excess D&O Policy Cannot Be Triggered Where Insured Settled With Primary Insurer for Less Than Full Policy Limits.

In a May 12, 2014 ruling, one week before the scheduled start of trial, United States Magistrate Judge K. Nicole Mitchell^[1] granted Summary Judgment to AXIS Insurance Company finding that the insured's settlement with its primary insurer for less than the primary policy's full \$10 million limit of liability precluded the insured's ability to trigger the AXIS Excess Policy.

Plaintiff Martin Resource Management Company (MRMC) filed its declaratory judgment action entitled *Martin Resource Management Corporation v. AXIS Insurance Company, et al.*, Civil Action Number 12-cv-00758 in the United States District Court for the Eastern District of Texas. By its action, MRMC sought coverage from AXIS and two other insurers for the defense costs and resolution paid by MRMC in connection with a shareholder oppression case.

During the pendency of the coverage action, MRMC settled with its primary insurer for less than the full \$10 million limits of the primary policy. Following the completion of fact and expert discovery, AXIS moved for summary judgment on a number of grounds, including that the AXIS Policy could not be triggered given MRMC's settlement with the primary insurer.

In the May 12, 2014 ruling, the Court held that the AXIS Insuring Agreement's use of the phrase "only after all applicable Underlying Insurance with respect to an Insurance Product has been exhausted by actual payment under such Underlying Insurance" made clear that the AXIS Policy required the underlying insurer to pay out its full \$10 million limit of liability before the AXIS Policy could be triggered.

In reaching its ruling, the Court relied upon the holding in *Citigroup Inc. v. Fed. Ins. Co.*, 649 F.3d 367 (5th Cir. 2011) and were not persuaded by MRMC's argument that the AXIS Policy language was ambiguous as the United States District Court for the Eastern District of Virginia had held in *Maximus, Inc. v. Twin City Fire Ins. Co., et al.* 856 F.Supp.2d 797 (E.D. VA 2012).

RMKB represented AXIS Insurance Company.

^[1] Pursuant to 28 U.S.C. § 636, the Parties consented to Magistrate

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