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Sixth Circuit Opinion Serves As Reminder Of Potential Pitfalls In Excess Coverage

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In previous posts, we've discussed the propensity of excess liability insurers to try to avoid coverage by challenging policyholder actions that occurred before the underlying defense costs or liability payments even reached the excess layer. In an opinion released earlier this month, the U.S. Court of Appeals for the Sixth Circuit addressed yet another such challenge and determined that actions a policyholder took years before its underlying policy limits were exhausted precluded coverage under its excess policy. For policyholders, the case serves as a useful reminder of how excess carriers might raise terms and conditions purportedly within their policies late in the claims process. *Stryker Corporation v. National Union Fire Insurance Company of Pittsburgh, Pa,* Nos. 15-1657/1664 (6th Cir. Nov. 18, 2016) involved a long-running (15-year) dispute between Stryker and its insurers over coverage for product liability claims involving Stryker's Uni-Knee artificial knee joint. Stryker tendered those claims to its umbrella insurer, XL, and its excess insurer, TIG. According to the Sixth Circuit, "XL denied coverage outright … while TIG waited in the wings, hoping that its excess layer would not be implicated at all." *Id.,* slip op. at 3. In 2001, Stryker filed a lawsuit against XL seeking coverage for the Uni-Knee claims. While that lawsuit was pending, Stryker settled a number of individual Uni-Knee claims for a total of $7.6 million, well within XL's $15 million limits. Subsequently, in 2004, Stryker was found to be liable to Pfizer, Inc., the predecessor manufacturer of the Uni-Knee, for that company's product liability damages. In 2005, Stryker filed a coverage lawsuit against both XL and TIG, seeking coverage from both for the Pfizer claim. After prolonged coverage litigation, the district court and Sixth Circuit held that XL was obligated to provide coverage to Stryker for both the individual Uni-Knee settlements and the Pfizer claim. But rather than pay the first-in-time individual settlements, XL elected to pay its full policy limits towards settlement of the Pfizer claim, thereby exhausting its coverage limits and leaving Stryker's earlier settlements of the individual Uni-Knee claims uncovered. Stryker amended its complaint in the second coverage action to seek coverage for the individual settlements from TIG. But TIG argued that, because Stryker had not sought TIG's consent for those settlements at the time they were made, the settlements were not "ultimate net loss" covered by its excess policy. TIG's policy defined covered "ultimate net loss" as: [T]he amount of the principal sum, award or verdict actually paid or payable in cash in the settlement or satisfaction of claims for which the insured is liable, either by adjudication or compromise with the written consent of [TIG], after making proper deduction for all recoveries and salvages.

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Stryker, slip op. at 3. To counter TIG's argument, Stryker presented testimony from TIG's former claims adjusters and underwriters, which according to Stryker, showed that, in practice, TIG did not require policyholders to obtain TIG's prior consent to settlements that were entered into before TIG's layer of coverage was reached. Based on the conflict between the policy language and the testimony of TIG's underwriters and claims adjusters, the district court determined there was a latent ambiguity in TIG's policy language that had to be construed in favor of coverage. On appeal, the Sixth Circuit reversed the district court. Reasoning that, "in the ordinary course, a latent ambiguity must be revealed by objective means," the appellate court determined that the "subjective," "contested" opinion testimony of TIG's claims adjusters and underwriters was insufficient to reveal any latent ambiguity in the policy's consent-to-settle provision. *Stryker,* slip op. at 8, 9. The Sixth Circuit also rejected Stryker's arguments that the consent-to-settle provision was a discretionary requirement that TIG had waived or that XL's initial wrongful denial of coverage could be imputed to TIG simply because TIG provided coverage on a follow-form basis. Although the facts of the *Stryker* case are somewhat unusual, there are lessons to be learned. Particularly instructive is the Sixth Circuit's statement that its opinion was based on provisions that were "unique" to TIG's excess policy. *Stryker,* slip op. at 11. Even nominally follow-form excess policies increasingly contain terms, exclusions, definitions or conditions that might not be found in the underlying policy. In a coverage dispute, an excess carrier may try to rely on such provisions to try to impose different or additional obligations on the policyholder over and above the obligations the policyholder owes to the primary insurer. In any given case, the validity of the excess insurer's argument will depend on the specific facts of the case and the particular terms of the policies at issue. A general takeaway from this decision, however, is that coverage counsel for excess carriers, even late in a claim, might attempt to take strict constructionist positions to try to contest coverage.