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The Voice

And The Defense Wins

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In a bench trial in Santa Clara County, the judge ruled in favor of Topa Insurance Company, represented by DRI members **Elaine K. Fresch**, **Linda Wendell Hsu**, and **Peter W. Dye** of **Selman Breitman LLP** in Los Angeles, finding that Topa's excess policy was not triggered, since the primary policies had not been properly exhausted. The case concerned a construction defect claim against Topa's insured, a general contractor (GC) that, during the course of the litigation, had its corporate status suspended. The primary carrier intervened and then reached a unilateral settlement with the property owner to pay the limits of one of the two policies under which it had been defending the GC insured, in exchange for the property owner fully releasing the primary carrier and the GC insured. The release specifically did not apply to the Topa excess policy, and purportedly allowed the claimant to continue the claim against the GC insured and to collect solely from Topa's excess policy.

Topa intervened in the underlying action and filed a declaratory relief action against the property owner, asserting no coverage under the Topa policy and contesting exhaustion of the primary policies. At trial, Topa established that the primary carrier had actually paid money to release not only the GC insured, but a completely different insured of the primary carrier that was also involved in the litigation. The property owner disputed that a portion of the settlement had to be allocated to the subcontractor, asserting the evidence was barred pursuant to the mediation privilege and parol evidence rule. This aspect of the settlement had not been disclosed to Topa, but was revealed only after persistent discovery.

In addition, Selman Breitman relied upon legal precedent to argue that the payment by the primary carrier was not made to satisfy a final judgment against the GC insured nor did it result in a final settlement against the GC insured, and was, therefore, an improper exhaustion per the policy language. Defense counsel further asserted that the other defending primary policy (issued by the same carrier) was applicable, and thus, the settlement must be allocated pro rata between the two policies.

The court, after conclusion of trial, found in Topa's favor on all points that the primary policies were not properly exhausted, as well as finding that the property owner claimant was collaterally estopped from relitigating a prior default judgment Topa had obtained against the primary carrier on the same issues of improper exhaustion. Topa was awarded its costs of over $47,000 against the property owner claimant as well.

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