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Traub Lieberman Partner Craig Rokuson Obtains Dismissal for Carrier on Horizontal Exhaustion Issue

Related Attorneys: Craig Rokuson

Traub Lieberman Partner Craig Rokuson recently obtained a dismissal on behalf of an insurance carrier (the “Excess Carrier”), which issued an excess policy to an insured sued for property damage occurring over several years. The Primary Carrier (“Primary Carrier” or “Plaintiff”) had issued two policies of insurance to the shared named insured and named the Excess Carrier as a defendant in the lawsuit. The Primary Carrier had alleged that the Excess Carrier may apply on a primary basis with respect to one or more of the primary policies issued by the Plaintiff.

Craig moved to dismiss, arguing that the excess policy issued by the Excess Carrier is a true excess policy. In response, the Plaintiff argued that while the excess policy may be excess to one of the primary policies, it may not be excess to the second policy issued in time. The plaintiff argued that vertical exhaustion of the policies may apply under the Court of Appeals precedent in the matter of *Viking Pump, Inc.* 27 NY3d 244 (2016). Craig noted in reply that the *Viking Pump* matter only applied vertical exhaustion because the policies at issue contained non-cumulation clauses and non-cumulation and prior insurance provisions. The policies at issue in Craig's suit did not contain any non-cumulation and/or prior insurance provisions. The court agreed with Craig's argument, holding that vertical exhaustion cannot apply, and that all primary policies must be exhausted horizontally prior to any involvement of the excess policies.