wiley

NEWSLETTER

Excess Insurer Has No Obligation to Share in Cost of Defense

September 2003

The United States Court of Appeals for the First Circuit has held that an excess insurer has no obligation to reimburse a primary insurer for its *pro rata* share of costs in defending a law firm insured by both carriers. *Lexington Ins. Co. v. General Accident Ins. Co.*, 338 F.3d 42 (1st Cir. 2003).

A primary insurer issued a professional liability policy to a law firm with a limit of liability of $10 million. Four additional insurers issued excess policies. The policy issued by one of the excess carriers provided that it would insure the law firm "in accordance with the applicable insuring agreements, terms, conditions and exclusions of the Underlying Policy...except as regards the premium, the obligations to investigate and defend and for costs and expenses incident to the same."

The primary insurer incurred $5.5 million in legal fees and expenses, which it sought to allocate *pro rata* among the various excess carriers. The First Circuit held that the excess carrier had no obligation to contribute to defense costs because its excess policy unambiguously provided that it had no obligation to do so. The court also held that the plain language of the policy undermined other arguments made by the primary carrier, including that it was entitled to reimbursement under the doctrine of equitable contribution, reasoning that the doctrine cannot "override explicit, unambiguous policy language."

For more information, please contact us at 202.719.7130.