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NEWSLETTER

Excess Carrier Not Required to Pay Defense Costs under Professional Liability Policy

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On cross motions for summary judgment, a federal district court, applying Pennsylvania law, has held that an excess carrier was not liable for a pro rata share of defense costs under a lawyers professional liability policy because the excess policy excluded contribution to defense costs unless the costs were incurred by the policyholder with the written consent of the insurer. General Accident Ins. Co. v. American Ins. Co., No. 99-3869, 2000 U.S. Dist. LEXIS 570 (E.D. Pa. Jan. 27, 2000).

Claims were made and lawsuits were commenced against the policyholder law firm in connection with its representation of a savings and loan association. The litigation was settled, and its primary and excess insurers agreed to pay their respective limits in settlement. The primary insurer subsequently sought reimbursement from the excess carriers for their pro rata share of defense costs. The primary insurer resolved this issue with three out of four of the excess carriers, but one excess carrier contended that it was not required under its policy to contribute to defense costs.

In the ensuing coverage litigation, the excess carrier argued that it was not liable for any portion of the defense costs because, among other reasons (1)the costs sought by the primary carrier were incurred before the primary policy limits were exhausted; and (2) although the excess carrier may be obligated in certain instances to pay a pro rata share of defense costs, the conditions for doing so were not met in this case.

The court rejected the excess carrier's first argument because the court determined that once liability attached, the excess insurer could be held liable on a pro rata basis for all costs, including those costs incurred before liability attached. The court held, however, that the excess carrier was not obligated to contribute to defense costs because coverage attached under the excess policy only for costs incurred by the policyholder with the written consent of the excess carrier. Here, defense costs had not been incurred by the policyholder personally, nor had they been incurred with the written consent of the excess insurer.