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NEWSLETTER

Application of "Other Insurance" Clause Not Dependent on Theory of Liability

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A federal district court, applying Illinois law, has held that an insurer whose "other insurance" clause provided that its coverage was excess if the insured had other coverage for the "loss" in question, provided excess coverage where the second insurer's policy provided coverage for only one of five theories of liability. *First Specialty Ins. Corp. v. Cont'l Cas. Co.,* No. 01C9175, 2003 WL 1220238 (N.D. Ill. Mar. 14, 2003).

This coverage dispute arose from a lawsuit against an association that had both a general liability and a nonprofit organization liability policy. The lawsuit against the association, which ultimately settled, contained five counts. The general liability policy provided potential coverage for one of the five counts. The nonprofit policy provided potential coverage for the remaining four counts. After the underlying case settled, litigation ensued between the insurers over their relative obligations to the policyholder.

The general liability policy indisputably provided primary coverage. The nonprofit policy contained an "other insurance" provision stating that "[i]f the 'entity'...has other insurance against a 'loss' covered by this policy, the insurance provided by this policy shall apply in excess of other such insurance."

The court held that the nonprofit policy provided excess coverage and rejected the general liability insurer's argument that both policies provided primary coverage that was to be allocated "pro rata." The court initially noted that the policyholder had "incurred a single loss based on multiple theories of liability," and that the lawsuit "was settled in a manner that makes it impossible to know what theory of liability (if any) was dispositive." The court explained that in a case involving similar facts and an "other insurance" clause identical to that contained in the nonprofit policy, the Seventh Circuit had held that "a 'loss' is not the same as a theory of liability." *W. Cas. & Sur. Co. v. W. World Ins. Co.,* 769 F.2d 381 (7th Cir. 1985). The court therefore rejected the general liability insurer's argument that the insurers provided "distinct" coverage because they provided coverage for different counts in the complaint. Instead, the court reasoned that both policies covered the same "loss"—the alleged injury to the underlying plaintiff by the insured.

The court also held that the nonprofit insurer was not estopped from contesting coverage. The court reasoned that the insurer had not breached a duty to defend and had promptly filed a declaratory judgment action after the general liability insurer requested fees. Additionally, the court reasoned that even if the nonprofit insurer had breached a duty to defend, "the failure to defend estops an insurer from raising exclusionary

defenses, not an excess carrier defense."

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130