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NEWSLETTER

Competing Other Insurance Clauses Result In Pro-Rata Sharing Between Insurers

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The United States District Court for the Eastern District of North Carolina, applying North Carolina law, has held that where an occurrence-based policy and a claims-made policy each contains an "other insurance" clause providing that the policy shall be excess of any other insurance, both carriers are equally liable for defense and indemnification of the insured. *Med. Mut. Ins. Co. v. Am. Cas. Co.*, 2010 WL 2402853 (E.D.N.C. June 14, 2010). In its decision, the court also held that an exclusion for other insurance in a claims-made policy does not necessarily eliminate coverage where an occurrence-based policy could also apply. Finally, the court noted that an insured need not specifically demand a defense to trigger coverage for defense costs where it has provided the insurer with a copy of the complaint.

The case involved a nurse who learned of a potential malpractice claim in April 2005 for alleged negligent treatment of a patient in March 2004. At the time the nurse learned of and reported the claim, she was insured under a claims-made liability policy. At the time the alleged negligence occurred, she was insured under an occurrence-based policy. The claims-made policy provided that "this insurance is excess over any other valid and collectible coverage . . . [a]ll other insurance whether stated to be primary, pro rata, contributory, excess, or contingent will first apply." The occurrence-based policy stated that "[i]f there is any other insurance policy or risk transfer instrument . . . that applies . . . such other insurance must pay first . . . . This insurance will not contribute with any other insurance."

The occurrence-based insurer defended and settled the malpractice claim. It then requested that the claims-made insurer provide indemnification in connection with the settlement. The claims-made insurer refused and subsequently initiated the instant action seeking a declaration that it had no duty to indemnify or defend the underlying action.

The court first addressed the claims-made insurer's argument that its policy did not apply based on an exclusion for "[d]amages arising out of or in connection with any injury resulting from rendering of or failure to render professional services by an Insured prior to the policy period if such damages are covered wholly or in part, by any other insurance." As an initial matter, the court stated that the first part of the exclusion was satisfied because the damages asserted arose from an injury resulting from the rendering of the nurse's professional services prior to the claims-made policy period. The court concluded, however, that the occurrence-based policy was not "other insurance" as described in the exclusion because it contained an

excess clause (designating the policy as excess over other applicable policies), and thus the exclusion was not triggered.

In support of applying the exclusion, the claims-made insurer argued that 1) the occurrence-based policy was the only policy in effect at the time of the occurrence (*i.e.*, when the professional services were rendered), and 2) that the exclusion constituted a "super-escape" clause that bars coverage where there is occurrence-based coverage for an event occurring prior to the inception of the claims-made policy. The court rejected the claims-made insurer's argument that "other insurance" should be determined at the moment coverage was triggered, reasoning that to do so would be to bar claims-made policy coverage anytime an occurrence-based policy exists. The court also rejected the claims-made insurer's "super-escape" characterization, stating that North Carolina courts look to the intent of the contracting parties rather than labels. The court determined that the phrase "any other insurance" as used in the exclusion was ambiguous as to whether excess insurance could constitute other insurance. As such, the court ruled that the clause must be interpreted against the insurer and in favor of coverage.

The court then evaluated the competing other insurance clauses, emphasizing that North Carolina law requires the court to ascertain the parties' intentions with respect to the insurance contracts. Stating that it could not discern a difference between the intentions underlying the competing other insurance clauses, the court determined that the goal of both was that their policy would be excess to any other insurance. Therefore, the court deemed the competing provisions were mutually repugnant and ordered that indemnity coverage be prorated between the two carriers.

Finally, the court addressed defense costs. In doing so, it first rejected the claims-made carrier's argument that it had no defense obligation because the insured never explicitly requested a defense from it. According to the court, the insured satisfied the claim-made policy's notice requirement by timely providing a copy of the complaint, which triggered a defense obligation irrespective of a specific request for a defense. The court then considered the claims-made insurer's argument that North Carolina law precluded an insurer with a duty to defend from pursuing another insurer with a similar duty for its share of defense costs under a theory of equitable subordination. While agreeing that North Carolina law did so hold, the court stated that North Carolina law also provided that the defending insurer could proceed against a non-defending insurer on a theory of contribution rather than equitable subordination, which was applicable to the instant case. Accordingly, the court determined that both carriers has to share equally in the defense costs.