

## “Other Insurance” Clauses Are Inapplicable Where Policies Do Not Cover Same Loss

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A Texas intermediate appellate court has held that (1) an "other insurance" clause in an errors and omissions policy did not apply where the other policy at issue covered different risks and (2) each insurer must bear a *pro rata* share of the defense costs because each insurer had an active duty to defend the underlying claims. *Hartford Cas. Ins. Co. v. Executive Risk Specialty Ins. Co.*, 2004 WL 2404382 (Tex. Ct. App. Oct. 28, 2004).

Two insurers issued different policies to a company that contracted with doctors to provide services to managed care providers. One insurer issued an errors and omissions policy, while another insurer provided general liability coverage. Both policies stated that the insurers would have the "right and duty to defend any Claim made against any Insured." The errors and omissions policy contained an "other insurance" clause, which stated that the policy was excess to "any other existing insurance or self-insurance (whether collectible or not), unless such other insurance or self-insurance is specifically stated to be in excess of this Policy; and [] any indemnification to which an Insured is entitled from any entity other than another insured."

One physician sued the insured for claims involving, among others, defamation, breach of contract and fraud. The general liability policy provided coverage for the defamation claim, but not the other causes of action. The errors and omissions policy specifically excluded coverage for defamation, but covered other allegations of the complaint. However, the errors and omissions insurer refused to defend the insured in the underlying suit, contending that the policy was excess to the general liability policy by virtue of the "other insurance" clause. The general liability insurer filed a declaratory judgment action seeking a determination that the errors and omissions insurer must bear *apro rata* share of the underlying defense costs because, despite the defamation exclusion, the other allegations were covered under the policy. The trial court granted summary judgment in favor of the errors and omissions insurer.

On appeal, the court first determined that the "other insurance" clause in the errors and omissions policy was inapplicable because the policies covered different risks. In so ruling, the court stated that "[t]he provisions of an 'other insurance' clause apply only when the 'other' insurance covers the same property and interest therein against the same risk in favor of the same party." The court then noted that "[w]here multiple insurers have a duty to provide a complete defense, neither must pay all of the defense costs because they share the duty until one has either exhausted its policy limits or is declared impaired." The court accordingly concluded that, because both insurers had an active duty to defend the insured, each insurer "must bear a *pro rata*

share of the costs of defense of the underlying suit."

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