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NEWSLETTER

Each Insurer Held Proportionally Liable in Conflict Between Concurrent Insurance Policies

December 2004

The United States Court of Appeals for the Fifth Circuit, applying Texas law, has held that where two concurrent policies would each provide coverage in the absence of the other, a clause converting one of the two policies into excess insurance created a conflict between the policies requiring liability to be apportioned*pro rata* for each insurer. *Royal Ins. Co. of Am. v. Hartford Underwriters Ins. Co.*, 2004 WL 2608269 (5th Cir. Nov. 17, 2004).

This coverage dispute stemmed from a wrongful death action brought against the insured corporation. The insured was covered under two policies issued by different insurers. The original complaint triggered coverage under the first policy, a "General Liability/Resident Health Care Facility Professional Liability Policy," and only the first insurer was notified of the lawsuit. The amended complaint triggered coverage under the second policy, a "Commercial General Liability and Healthcare Professional Liability Policy," as well. The second insurer subsequently declined to join in the defense of the suit or participate in a pending mediation, maintaining that it had insufficient notice and time to prepare. At the mediation, the first insurer reached a settlement with the insured that included payment for defense expenses. The second insurer refused the first insurer's demand for contribution and this subrogation action followed.

After first upholding the trial court's determination that, based on the allegations in the complaint, the professional liability, and not the comprehensive general liability, provisions of the policies were triggered, the appellate court turned to a potential conflict between the policies' "other insurance" provisions. The first policy's clause contained a *pro rata* provision, which apportioned liability in the event of concurrent coverage. The second policy's clause contained a provision that converted its coverage into excess insurance when concurrent coverage existed.

The appellate court held that a conflict existed. Specifically, the appellate court cited to the Texas Supreme Court's decision,*Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 589 (Tex. 1969), which stated:

When, from the point of view of the insured, she has coverage from either one of two policies but for the other, and each contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance, there is a conflict in the provisions.

The court explained that *Hardware Dealers* required that, where a conflict is found, the conflicting provisions should be ignored and liability apportioned *pro rata*. Using this rule of interpretation, the appellate court reasoned that from the insured's perspective both policies would provide full coverage if the other policy did not exist. Based on this reasoning, the appellate court concluded that "[a] 'reasonable construction' from this perspective yields a conflict" and that liability for the settlement accordingly had to be apportioned *pro rata* between the two insurers.

For more information, please contact us at 202.719.7130.