

# Excess Policy Follows Form of Primary Policy for Purposes of Notice Provision Even Where Primary Policy Does Not Ultimately Respond to Claim

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The United States Court of Appeals for the Third Circuit, applying Pennsylvania law, has held that notice given to an excess insurer after the expiration of a claims-made and reported policy is ineffective and that the excess policy still follows form to the primary policy even though the primary policy was circumvented by a state catastrophe fund. *Lexington Ins. Co. v. Western Pennsylvania Hospital*, 2005 WL 4003 (3d Cir. Sept. 9, 2005).

The insured hospital purchased a primary claims-made and reported professional liability policy, which provided coverage for damages for claims "caused by a medical incident which occurs on or after the Initial Effective Date . . . and for which claim is reported to Company during the policy period." The hospital also purchased an occurrence policy from a second insurer, which provided coverage for claims arising out of incidents that took place during the policy period, provided that notice is given to the insurer "as soon as practicable." Finally, the insured purchased from that same insurer excess coverage for the medical professional liability claims-made policy. The policy was a "follow-form, claims-made" policy. The excess claims-made policy contained two endorsements. The first endorsement provided that "[a]ll of the terms and conditions of said underlying insurance shall apply to this insuring agreement." The second provided that "[i]n the event underlying insurance shall not be applicable to any claim for the reason that the [Medical Professional Liability Catastrophe Fund (CAT Fund)] shall assume or be required to assume primary responsibility for payment . . ., coverage under this policy as to such claim shall apply as excess immediately over the limit of liability of the [CAT] Fund."

The hospital was sued for medical malpractice and submitted a "Notice of Claim" to its primary insurer. The primary insurer referred the matter to the CAT Fund, which takes responsibility for any claims made more than four years after the incident giving rise to the claim. The claim exceeded the policy limits of the CAT Fund and the excess policy was thus implicated. The hospital did not submit its claim to the excess insurer until more than a year after the expiration of the policy. The excess insurer filed suit seeking a declaration that it could deny coverage for the claim because the hospital did not give notice of this claim until more than a year after

the policy had expired.

The hospital argued that the two endorsements found in the excess policy were mutually exclusive and that because the CAT Fund assumed responsibility for payment of the claim, the primary policy's notice requirements were not relevant. The hospital contended that the conditions found in the occurrence policy should instead govern the excess policy for this claim. The court disagreed, however, stating "the local reading of the [excess] policy is to find [the endorsements] to be complementary rather than mutually exclusive." The court explained that the policy expressly states that it provides "claims-made" coverage, and that, under the terms of the first endorsement, any exceptions to the "follow-form" coverage must be "expressly stated." The court then held that the second endorsement does not provide an "express exception."

The court held, moreover, that the provisions of the occurrence policy are "clearly inapplicable" to the excess "claims-made" policy because the two policies provided coverage for entirely different claims—the occurrence policy provided coverage for occurrences that take place within the policy period and are reported "as soon as practicable" (but not necessarily within the policy period), while the claims-made policy provided coverage for occurrences that take place anytime and are reported during the policy period. Noting this important difference, the court held that it would make little sense to apply the provisions of the occurrence policy to the claims-made policy.

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