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NEWSLETTER

Other Insurance Clause in Company's Employee Endorsement Trumps Other Insurance Clause in the Employee's Individual Policy

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In an unreported decision, the United States District Court for the Northern District of Georgia, held that an "other insurance" clause contained in an "employee endorsement" took precedence over a similar clause in the employee optometrist's individually held policy. *Am. Cas. Co. of Reading, Pa. v. Mag Mut. Ins. Co.*, 2006 WL 89857 (N.D. Ga. Jan. 12, 2006).

The case was a coverage dispute where the plaintiff insurer was seeking pro rata contribution from the defendant insurer based on conflicting other insurance clauses in connection with a medical malpractice judgment within the coverage terms of both policies. The plaintiff's policy was an optometric protector plan issued to an individual optometrist. That policy provided coverage for injuries or damage caused by supplying or failing to supply professional services. The defendant's policy was a physicians and surgeons professional liability policy issued to the optometrist's employer, providing coverage for "civil damages resulting from the providing, or failing to provide, medical professional services." The defendant's policy contained a "Blanket Employee Endorsement" that provided coverage to employees working within the course of employment and under the supervision of the employer policyholder.

The optometrist and, vicariously, the employer were found liable for medical malpractice for which the plaintiff insurer paid the full costs of defense and indemnity. Both the plaintiff's policy and defendant's policy contained other insurance clauses. The plaintiff's other insurance clause stated: "If you have other insurance which applies to the loss, the other insurance must pay first." The defendant's policy provided that "[i]nsurance under this coverage is in excess of and payable only after all other valid insurance and self-insurance limits of coverage have been exhausted paying settlements and judgments." Additionally, the defendant's policy contained a more specific other insurance clause within the Blanket Employee Endorsement: "This coverage is excess over other valid professional liability insurance which specifically names an individual or position."

The defendant first argued that the optometrist was not covered under its policy at all, citing extrinsic

evidence regarding the optometrist's employment contract. The court rejected this argument based on the plain language of the defendant's policy. The defendant next argued that the optometrist could not have been under the supervision of his employer because Georgia statutes govern the relationship between an optometrist and his employer. The court rejected this argument as well because "supervision" is not defined in the policy and because this reading would result in the Blanket Employee Endorsement providing only illusory coverage.

The court then considered whether the competing other insurance clauses were irreconcilable and thus cancelled one another out under Georgia law. Citing the language in the Blanket Employee Endorsement of the defendant's policy, which provided that available coverage for the policyholder's employees was "excess over other valid professional liability insurance which specifically names an individual," the court determined that the competing provisions were not irreconcilable. According to the court, "the sensible reading" of the defendant's policy was that it was designed to offer protection to the policyholder's employees, but only after their individual coverage was exhausted. Thus, it determined that the other insurance clause of the defendant's policy controlled, and that the underlying judgment was subject to coverage only under the plaintiff's policy.