

## Other Decisions of Note

---

April 2006

### **Court Holds That ERISA Exclusion Bars Coverage for Negligence Claim Against Employer**

The United States District Court for the Southern District of Ohio has granted summary judgment in favor of an E&O insurer, holding that claims by a policyholder were barred under the policy's Employee Retirement Income Security Act (ERISA) exclusion. *Ball v. Transom Employment Co.*, 2006 WL 462435 (S.D. Ohio Feb. 24, 2006). The court determined that because the claims at issue "sounded in" or were pre-empted by ERISA, they necessarily were "based on or arose out of" that statute and therefore fell within the terms of the policy's ERISA exclusion.

### **No Liability for Insurer's Settlement of Medical Malpractice Claims**

In an unreported decision, the United States District Court for the Southern District of Texas has held that a medical malpractice insurer did not act improperly by settling a malpractice action even though the insured doctor objected to the settlement. *Kreit v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 322587 (S.D. Tex. Feb. 10, 2006). The court rejected the doctor's argument that he was entitled to take the case to trial to "clear his good name in court." The court reasoned that the policy language, which stated that "[we] have the right to investigate, negotiate and settle any suit or claim if we think that's appropriate," unambiguously gave the insurer authority to settle the case without the doctor's consent.

### **Court Holds That Policy with "Pro Rata" Other Insurance Clause Is Primary to Policy with "Excess" Other Insurance Clause**

The United States District Court for the Northern District of Texas, applying Texas law, has held that two policies containing "pro rata" other insurance clauses were primary to a third policy that contained an "excess" clause. *Nutmeg Ins. Co. v. Employers Ins. Co.*, 2006 WL 453235 (N.D. Tex. Feb. 24, 2006). The case involved a dispute among three insurers concerning the relative applicability of their respective policies to a claim against their common insured for advertising injury. The court first held that although one policy provided professional liability coverage and the other two policies provided general commercial liability coverage, the policies were concurrent and were thus considered "other insurance" to one another because all three policies provided coverage for "advertising injury." The court next stated that there was no conflict between the other insurance clauses in the policies. The court concluded that the two policies containing "pro rata" other insurance clauses were primary to the third policy that contained an "excess" other insurance clause and that the two insurers providing primary coverage were thus responsible for the entire cost of the defense of the insured. The court stated that "Texas courts follow the majority rule that when a dispute exists

between the liability of an insurer with a policy that contains a '*pro rata*' other insurance clause and the liability of an insurer with a policy that contains an 'excess clause,' the 'excess clause' is given full effect, making the policy with the '*pro rata*' clause liable to its limits."

**Seventh Circuit Determines Arbitration Clause to Be Ambiguous, But Rules That It Must Be Applied in Favor of Arbitration**

The United States Court of Appeals for the Seventh Circuit has determined that the term "agreement" in an excess public liability policy arbitration clause was ambiguous, but that the clause must be interpreted in favor of promoting arbitration. *County of McHenry v. Insurance Co. of the West*, 2006 WL 435421 (7th Cir. Feb. 24, 2006). The policy provided that "[i]n the event that a dispute arises between the Insured and the Company under this agreement or concerning when a claim or suit should be settled or the amount of such settlement, such dispute shall be subject to arbitration." The policyholder contended that "agreement" referred only to the arbitration provision itself, not the entire policy, thus limiting the arbitration provision to disputes regarding whether a claim should be settled or the proper amount of a settlement. In considering the issue, the appellate court determined that the term "agreement" was ambiguous but held that "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Accordingly, it affirmed the district court's dismissal of the policyholder's action based on the applicability of the arbitration clause.