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NEWSLETTER

Comprehensive Excess Policy Applicable only after Exhaustion of Professional Liability Policy

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An Illinois appellate court has held that a comprehensive excess policy issued to a hospital and its employees provided coverage to policyholder nurses for a malpractice claim only after the limits of the nurses' professional liability policies were exhausted. *Travelers Indem. Co. v. Am. Cas. Co. of Reading,* No. 1-02-2014, 2003 WL 751081 (Ill. App. Ct. Mar. 5, 2003).

A medical malpractice suit was brought against three nurses at a hospital, and the suit ultimately settled for $4.5 million. Each of the nurses had purchased professional liability insurance policies from Insurer One. Two of the policies had a $500,000 limit per medical incident; the third had a $1 million limit per incident. Each of Insurer One's primary policies included an "other insurance" provision stating that: "[i]f you have other insurance...the other insurance must pay first." Insurer Two issued both a primary general liability policy and a comprehensive excess insurance coverage policy to the hospital. Insurer Two's primary general liability policy had a limit of $500,000 per occurrence, and the excess insurance policy had a limit of $10 million per claim and in the aggregate. Insurer Two's excess policy contained an "other insurance" provision stating that the policy "is excess over any other insurance available to the Insured (including a policy purchased by any additional insured hereunder)." Litigation between the two insurers followed over whether Insurer Two's excess policy was excess over Insurer One's professional liability policies.

The court held that Insurer Two's excess policy applied only after exhaustion of the professional liability policies. The court observed that if two insurance policies have "mutually repugnant" clauses providing that each will be excess over any other applicable insurance, then each insurer is liable for a *pro rata* share of the judgment or settlement, but only if the policies are on "the same level." The court stated that it "'must construe the policies as a whole'" in determining whether two policies are on the same level. Noting that primary and excess insurance serve different functions, the court said that an umbrella excess liability policy is not on the same level as a primary coverage policy and therefore reasoned that the Insurer Two's excess policy was not intended to pay the first dollar of loss. The court pointed out that the excess policy provided coverage to an entire hospital for a variety of risks. Conversely, each professional liability policy covered only one nurse for one type of risk. Moreover, the excess policy's "other insurance" clause expressly stated that it would be "excess over any other insurance...*purchased by an additional insured thereunder*." The court concluded that

this provision did not contemplate a *pro rata* contribution with other insurance policies. Construing the policies as a whole, the court found the excess policy to be a "true excess policy," and not merely an extension of the primary policy issued by Insurer Two.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130