

Fifth Circuit Rejects “Stacking” of Consecutive Policies’ Limits

October 2008

The United States Court of Appeals for the Fifth Circuit, applying Texas law, has held that stacking of consecutive primary policy limits is not permitted where a single covered event triggers coverage. *North American Specialty Ins. Co. v. Royal Surplus Lines Ins. Co.*, 2008 WL 3877235 (5th Cir. Aug. 22, 2008).

A nursing home purchased three successive primary liability insurance policies from two primary insurers, with policies from one primary insurer providing \$1 million in coverage for the periods from April 1998 to April 1999 and April 1999 to April 2000, and a policy from a second primary insurer providing \$500,000 in coverage for April 2000 to April 2001. The nursing home also had \$5 million in excess coverage. The wife of a patient who lived at the nursing home from February 1999 to June 2000 sued the home and several of its employees for injuries resulting from an alleged pattern and practice of neglect throughout that time period.

At trial, a jury awarded more than \$4.5 million in actual and punitive damages. The excess insurer settled for \$1.625 million on behalf of the nursing home and filed the instant coverage action against the primary insurers. The excess insurer argued that the underlying plaintiff had alleged several discrete occurrences over the course of the three primary policy periods such that the primary policy coverage limits should be "stacked" and its excess coverage would not be triggered until the combined limit of all three primary policies had been reached. The Fifth Circuit held that, where a single occurrence extends through multiple consecutive policy periods, coverage limits may not be "stacked" and the applicable coverage limit is the highest limit at any single point in time during the coverage periods of the triggered policies.

The court then held that the alleged negligence in this case constituted a single occurrence under the applicable policies. The primary policies provided that "[a]ll related 'medical incidents' arising out of the providing of or failure to provide professional health care services to any one patient shall be considered one 'medical incident'" and that ". . . a series of related acts, errors, omissions, or occurrence[s] shall be treated as a single claim." The court noted that the "plaintiff's theory in the underlying suit . . . was that [the patient] was injured by a series of acts and omissions that were *related*," involving "continuing course of repeated negligence." Accordingly, the court concluded that the underlying suit involved a single covered event to which a \$1 million limit applied.

The court further held that the anti-stacking rule applied to defense costs, noting that the primary policies at issue provided that defense costs counted against the policy limits. In doing so, the court rejected the excess insurer's argument that "fairness dictates that the insured should get the benefit of having paid multiple premiums over the years." The court concluded that the policyholder "received what he bargained for—insurance for each year" and that "if the insured wanted a policy that had an unlimited defense obligation, rather than an eroding one, it should have contracted for such a policy."