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NEWSLETTER

Other Insurance Clause of "No Liability" Variety Trumps "Excess" Clause

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The Missouri Court of Appeals has held that an insurer was not entitled to equitable contribution from a second insurer where both insurers provided primary professional liability coverage to a nursing home facility but where the "other insurance" clause in the latter's policy was of the "no liability" variety and the one in the former's policy was an "excess" clause. *Wentzvill Park Assocs., L.P. v. Am. Cas. Ins. Co.*, 2008 WL 4051328 (Mo. Ct. App. Sept. 2, 2008).

The dispute between the plaintiff and defendant insurers arose out of a wrongful death action asserted against a nursing home facility and a nurse on duty who purportedly had failed properly to supervise a resident, the result of which was that the resident fell and sustained fatal injuries. The plaintiff insurer, which had issued a $1 million professional liability policy that provided coverage for the suit, settled the matter for $405,000 and then sought contribution from the defendant insurer, which had issued a policy that also afforded coverage for the claim.

Both policies at issue contained other insurance clauses. The court recognized that not all such clauses are "mutually repugnant" such that they are to be disregarded in the event of concurrent coverage. Rather, the court noted that certain provisions are sufficiently disparate that each may be given its full effect, while maintaining coverage for the insured. In this connection, the court identified three general types of other insurance clauses: (1) a "*pro rata*" clause that provides for an insurer to pay a *pro rata* share of the loss, usually in proportion to the limits of all other available insurance; (2) an "excess" clause that limits an insurer's liability to the amount by which the loss exceeds the coverage of other valid and collectible insurance; and (3) a "no liability" clause that provides that an insurer is not liable for any loss covered by other available insurance.

The plaintiff insurer's policy stated that "[t]his insurance is excess over any other insurance other than insurance specifically arranged by you on an umbrella or similar basis to apply as excess of this Coverage Form." The defendant insurer's policy, on other hand, provided that "[i]t is the intent of this policy to apply only to loss which is more than the total limit of all . . . other and valid and collectible insurance, whether primary, contributory, excess, contingent or otherwise," and that if any loss insured under the defendant insurer's policy is insured under any other policy, the "loss shall be paid first by" that policy. The court determined that the

former provision was an excess clause, while the latter was a no liability clause. The court further determined that both policies provided primary coverage such that the situation involved concurrent coverage.

Looking to the holding of the Missouri Supreme Court in *State Farm Mutual Auto Insurance Company v. Western Casualty & Surety Company*, 477 S.W.2d 421 (Mo. 1972) (en banc), the Court of Appeals concluded that the combined effect of the two other insurance clauses in this situation was that the plaintiff insurer's policy responded first. Specifically, according to the court, "the 'no liability' clause prevailed over the 'excess' clause because the language in the 'no liability' clause anticipated the possibility of the existence of an 'excess' clause in another policy and expressly contracted against liability in that situation." Consequently, and because the loss incurred did not exceed the limit of liability of the plaintiff insurer's policy, the Court of Appeals affirmed the entry of summary judgment in favor of the defendant on the plaintiff insurer's claim for contribution.