

Insured Did Not Breach Cooperation Clause by Renegotiating New Policy to Be Excess to Original Policy under the Extended Reporting Period

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The United States District Court for the Southern District of Ohio has held that an insured did not breach the cooperation clause of a policy when a claim was filed against the insured after the expiration of its policy but within the extended reporting period (ERP), and the insured renegotiated its subsequent policy with a different insurer that was intended to be a primary policy but instead was made excess to the first policy's coverage under the ERP. *Abercrombie & Fitch Co. v. Federal Insurance Co.*, 2008 WL 4425523 (S.D. Ohio Sept. 30, 2008).

The insurer issued an executive liability and entity securities liability policy with a one-year policy period. The policy permitted the insured to purchase a one-year extended reporting period for any claims that arose after the end of the policy period for conduct that occurred during the policy period. The policy also included a "cooperation clause," which provided that the insured agreed "to provide the [insurer] with all information, assistance and cooperation which the Company may reasonably require and agree that in the event of a Claim the Insureds will do nothing that could prejudice the Company's position or its potential or actual rights of recovery." In addition, the policy also contained an "other insurance" clause, providing that:

If any Loss under this coverage section is insured under any other valid insurance policy(ies), then this coverage section shall cover such Loss, subject to its limitations, conditions, provisions and other terms, only to the extent that the amount of such Loss is in excess of the applicable retention (or deductible) and limit of liability under such other insurance, whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over the Limits of Liability provided in this coverage section [the Executive Liability and Entity Securities Liability Coverage section].

After the policy period ended, and within the time for the insured to exercise the ERP, a claim was filed against the insured for conduct that occurred during the policy period. The insured exercised the ERP option according to the terms of the policy. As the policy period had expired, however, the insured already had negotiated a separate policy for the following year. Upon the claim being filed within the ERP, the insured renegotiated the new policy to be excess to the other primary coverage under the ERP. The original insurer denied coverage to the insured on the basis that the insured's conduct in renegotiating the second policy to be excess to that of the original insurer, allegedly cutting off the insurer's right of contribution in breach of the cooperation clause.

The Ohio federal district court denied the insurer's motion for summary judgment, stating that the insurer's "positions with regards to [the cooperation clause and the other insurance clause] are not the only reasonable interpretations of these [provisions]. Rather, each [clause] can be reasonably interpreted in such a manner that requires [the insurer] to provide coverage for the [claims at issue.]" The court first noted that the plain language of the policy provided that the insurer "anticipated that [the insured] would have or could obtain insurance specifically excess to [its] coverage."

Next, the court stated that the insurer's interpretation of the cooperation clause was overly broad, holding that "[i]t is an unreasonable interpretation of [the cooperation clause] to find that it requires [the insured] to structure its insurance needs based not on its own needs and in its own best interests, but rather to minimize its insurer's potential exposure." In holding that the insured did not breach the cooperation clause, the court also relied on the fact that the insurer did not allege that the insured "prejudiced its ability to defend the [claims at issue] on the merits."