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NEWSLETTER

Professional Liability Policy Is Excess to General Business Policy

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In an unreported decision, an Ohio appellate court has held that a professional liability policy issued to a pharmacist is excess to a general business policy issued to the pharmacy that employed the pharmacist because the professional liability policy was expressly excess. *Monroe Guar. Ins. Co. v. Pharmacists Mut. Ins. Co.,* 2004 WL 1595120 (Ohio Ct. App. July 16, 2004).

A pharmacist was sued by a customer for incorrectly measuring a prescription dosage. The pharmacist sought coverage under his professional liability policy and under a general business policy issued to the pharmacy where he worked. The general liability insurer accepted the defense and demanded that the professional liability insurer contribute to the defense costs. The professional liability insurer refused to contribute to defense costs or indemnification, contending that its policy was excess and exhaustion had not occurred. This declaratory judgment action followed.

On appeal, the court found that the professional liability policy was excess to the general liability policy and that the professional liability insurer was not required to contribute to defense costs. The court relied on language in the insuring agreement of the professional liability policy stating, "We will pay on your (but not your employer's) behalf the ultimate net loss in excess of the underlying insurance." The policy defined underlying insurance as "an insurance policy or program of self insurance, including deductible, or risk retention either primary, contingent, excess or otherwise, which requires the providing of a defense and/or indemnification related to pharmacy or pharmacist (or druggist) professional liability, which provides coverage for you as an insured in any capacity."

The policy also stated in various places that it was an excess policy, including one provision stating in all capital letters that it is "specifically designed to be excess coverage for You. This policy is intended to be your personal professional umbrella policy, as it is excess to other professional liability policies and is rated to be excess. This insurance does not apply until the limits of your employer's professional liability coverage...has [sic] been exhausted."

The general business insurer argued that it also had an excess insurance clause in its policy, thereby requiring the court to apply the rule in Ohio that where two policies both have excess insurance clauses, the insurers are liable in proportion to the amount of coverage provided by their respective policies. The excess insurance

clause of the general business insurer provided that if other insurance is available for the same loss, the policy will pay only "the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not" and that the insurer will only defend a claim or suit if no other insurer agrees to defend. The policy also provided that it is "excess over any other insurance that insures for direct physical loss or damage."

The court rejected the general insurer's argument, reasoning that the professional liability policy and the general business policy did not cover the same risk since the professional liability policy did not afford coverage "until all other insurance is exhausted." The court explained that the excess insurance provision of the general business insurer's policy "has no legal significance unless there is another policy of primary coverage or until the condition precedent of the exhaustion of coverage from all other policies has been achieved." Since the professional liability policy did not provide primary coverage, this provision was inapplicable and, as a result, only the general business insurance policy provided primary coverage.

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