

When Other Insurance Provisions Conflict, Standard Escape Provisions Will Not Prevail Over Excess Provisions

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The United States Court of Appeals for the Sixth Circuit, applying Kentucky law, has found that when other insurance provisions in two policies conflict, an "excess" other insurance provision will prevail over an "escape" other insurance provision that excludes coverage solely on the basis of the existence of other insurance. *Great Am. Assur. Co. v. Am. Cas. Co. of Reading, Pa.*, 2013 WL 85826 (6th Cir. 2013).

The mother of a child who attended a day care center specializing in medically fragile children filed suit in Kentucky state court against the child care center and employees of the center, including two nurses. One insurer issued a general liability policy to the day care center, and a second insurer issued a professional liability to the center's two nurses. The general liability insurer provided a defense to the child care center in the suit, while the professional liability insurer provided a defense to the two nurses. The general liability insurer and professional liability insurer together settled the claims by the mother.

Following the settlement, the general liability insurer filed a lawsuit against the professional liability insurer seeking contribution for the settlement on the asserted basis that it paid more than its equitable share. The professional liability insurer brought a counterclaim, contending that its policy was excess to the general liability policy and that the general liability insurer thus was responsible for all defense and indemnity payments made on behalf of the nurses. The general liability insurer in turn argued that there was no coverage for the claims against the nurses because the "other insurance" provision in its policy excluded coverage for "[d]amages which are covered by other insurance in any other insurance policy whether collectible or not." The policy language in the professional liability insurer's policy provided, in relevant part, that, "[i]f there is any other insurance policy . . . that applies to any amount payable under this Policy, such insurance must pay first. It is the intent of this policy to apply only to amounts covered under this Policy which exceed the available limit of . . . the other insurance."

In resolving the coverage dispute, the appellate court analyzed the professional liability insurer's other insurance provision against the corresponding provision in the general liability insurer's policy and found that the other insurance provision in the professional liability policy applied. First, the court determined that the general liability insurer's "other insurance" provision, which was framed as an exclusion, is more appropriately

classified as a “standard escape clause” rather than as a true exclusion, as it purported to preclude coverage not on the basis of a specific risk or activity, but rather solely on the basis of the existence of other insurance. According to the court, Kentucky delineates between “standard” and “non-standard” other insurance provisions. “Non-standard” provisions expressly anticipate the possibility of other insurance covering an act or omission and seek to contract against liability in a particular situation. Following that determination, the court found that the general rule in Kentucky is that where a “standard” other insurance provision conflicts with an “excess” other insurance provision, the insurer with the “standard” other insurance provision is not relieved of its obligation to provide primary coverage. Thus, the court affirmed the district court's finding in favor of the professional liability insurer.