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ALERT

Policy with More Specific "Other Insurance" Provision Trumps, Policy with More General Provision Must Be Exhausted First

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The United States Court of Appeals for the Second Circuit has held that, with respect two insurance policies providing coverage for malpractice claims against a nurse, the policy with an "other insurance" provision specifically referencing other excess insurance was excess to the policy with a more general "other insurance" provision. Thus, the court held that the more specific policy did not apply until the other policy had been exhausted. *WCHCC (Bermuda) Ltd. v. Granite State Ins. Co.*, 2014 WL 1758662 (2d Cir. May 5, 2014).

A nurse was insured for malpractice claims under two insurance policies: the hospital's policy and a separate policy providing coverage only to the nurse. After a malpractice claim against the nurse was settled, the hospital's insurer filed suit against the nurse's insurer, which had not participated in the settlement. At issue were the "other insurance" provisions of the policies. The hospital's policy provided that it was "excess of any valid and collectible insurance . . . whether such insurance . . . is stated to be primary, contingent, [or] excess." The nurse's policy provided that "if there is other insurance, which applies to the loss covered under this Policy, the other insurance must pay first."

Affirming the district court's grant of summary judgment and award of damages to the hospital's insurer, the Second Circuit held that the more explicit language of the hospital's policy made it excess to the nurse's policy. The court stated that, as a general matter, "when each of two insurance policies 'generally purports to be excess to the other, the excess coverage clauses are held to cancel out each other and each insurer contributes in proportion to its limit amount of the

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insurance.'" However, this rule does not apply "'when its use would distort the meaning of the terms of the policies involved,' which 'turns on consideration of the purpose each policy was intended to serve as evidenced by both its stated coverage and the premium paid for it, as well as upon the wording of its provision concerning excess insurance.'"

Examining the policy language at issue, the court held that the hospital's policy was excess to the nurse's policy because the latter "contain[ed] no explicit statement about its position with respect to other *excess* policies." The court also stated that the difference in premiums for the two policies was not helpful to the determination of which was excess because they provided different coverage. One policy provided coverage for the entire hospital and its employees, the other provided coverage for one nurse.

The opinion is available here.