Insurance Law-Claims Submission/Excess Policies

by Ken White

In a prior article, it was suggested that if any type of claim is alleged or suit is brought against an insured, a review of all of the insured's various liability policies is in order, including excess (the term hereafter used) or umbrella policies. The idea being that if coverage is not found under one type of liability policy, it may be found in the most unsuspecting places in another policy. A relatively recent unreported U.S. Sixth Circuit Court of Appeals decision lends credence to this concept.

Usually, an excess insurer's coverage is not triggered until the underlying primary insurer's limits have been exhausted. However, some excess policies are also designed to "drop down" and provide primary coverage, depending on the facts of a claim. Without dwelling on the complicated factual background or other coverage issues presented in the case, and also without consideration as to whether the policy at issue was truly a "drop down" excess policy, the Sixth Circuit in *IMG Worldwide, Inc. v. Westchester Fire Insurance Company, 6th Cir. Nos. 13-3832 and 13-3837, 2014 WL 3409044 (July 15, 2014)* opened the door for the notion that an excess carrier may have a duty to defend (in this case, pay previously incurred defense costs) when the underlying primary carrier wrongfully denies coverage and refuses to defend.

Although the case was decided under Ohio law, the Sixth Circuit made it clear that it was the policy language before it which drove the decision, not specifically Ohio's common law on insurance. The policy stated that the excess insurer had a "duty to defend the insured in any 'suit' seeking damages for … 'property damage' *when the 'underlying insurance' … does not provide coverage … .*" In this case, the underlying primary insurer had initially denied coverage and later settled with the insured, but only after the insured had incurred significant defense costs which ultimately were not fully paid by the primary insurer. Among other things, the insured pursued the excess carrier for those unreimbursed defense costs. The question thus became whether an underlying primary policy that *"provides for coverage"* (but where that insurer wrongfully denies coverage), really *"provides coverage"* as that phrase appeared in the excess policy.

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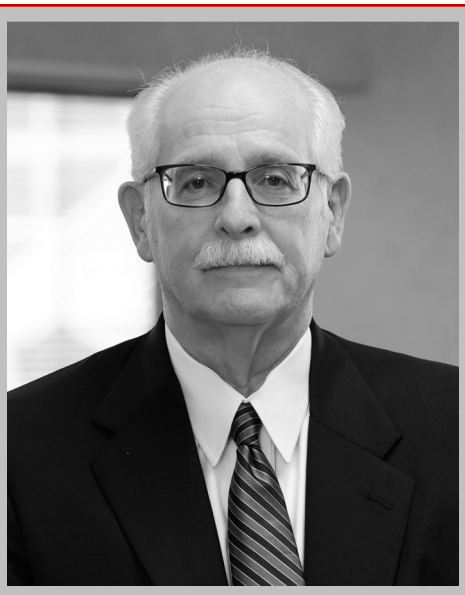
The Sixth Circuit concluded that the word "provides" can reasonably mean either "provide for" or "undertakes to deliver" coverage, and therefore, the policy was ambiguous and should be construed against the excess insurer as the drafter of the policy language, i.e. *contra proferentem.* The Sixth Circuit went on to state that it was going to construe the word "provides" to mean "undertakes to deliver". Using this definition, the policy would then be interpreted to read that the excess carrier had a "duty to defend … *when the 'underlying insurance' does not undertake to deliver coverage …".* The court also pointed to another supportive, although not necessarily determinative provision in the policy which stated that "If no other insurer defends, [the excess insurer] will undertake to do so… ."

The result: This excess insurer had an obligation to defend when the primary insurer refused. The lesson: An insured should simply not assume there may be possible coverage under only the most likely policy, but consider timely submitting the claim to all insurers, especially excess carriers, which might conceivably provide coverage. You never know what coverage you may trigger, or at least what argument you may preserve for later coverage litigation if necessary.



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