AKO POLICYHOLDER ADVISOR
The Policyholder Law Firm
Volume 8 Number 12 www.andersonkill.com December 1999

Maximizing Additional Insured Coverage:

Beware Insurance Company "Other Insurance" Assertions

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The availability of "Additional Insured" liability insurance coverage may enable a contractor, design professional, municipality or other organization to receive insurance protection for their claims without having to rely upon their own insurance programs, and thus avoid driving up their own insurance premiums. As a matter of course, business, frequently require that those with whom they do business insure or indemnify them against loss or liability. Additional Insured coverage yields at least three direct benefits. First, Additional Insureds may be afforded a legal defense against a lawsuit. Second, Additional Insured coverage may pay for any liability or loss suffered. Third, Additional Insured coverage can provide coverage without having to pay co-insurance obligations, deductibles or self insured retentions (SIR).

Additional Insured Claims Denied

As some have learned the hard way, Additional Insured coverage is not provided without a fight. Indeed, insurance companies may be especially tempted to deny the claims of parties such as Additional Insureds with whom the insurance company has a limited business relationship.

In numerous cases, insurance companies have unsuccessfully attempted to disclaim their coverage obligations to Additional Insureds. In these cases, the Additional Insureds have had to sue to secure insurance coverage. These cases provide a reminder to Additional Insureds that sometimes it is necessary to initiate litigation in order to secure insurance benefits.

Other Insurance Provisions & Deductibles

One of the most common issues that can arise in the context of Additional Insured coverage is when an Additional Insured seeks insurance coverage under another party's liability insurance with low or no deductibles, notwithstanding the conflicting "other insurance" clauses contained in the insurance policy. Some insurance companies providing Additional Insured coverage will attempt to deny a claim or reduce payment on a claim by arguing that the "other insurance" provision contained in many insurance policies precludes or reduces Additional Insured coverage. The key issue under such a situation becomes whether the Additional Insured even has "other insurance" when, under the Additional Insured's own insurance program, the Additional Insured has sizeable deductibles or SIR's.

For example, assume that a company is an Additional Insured party ("AIP") under XYZ Corporation's liability insurance policies, which have no deductibles or SIR's, but do contain an "other insurance" clause. Further assume that the AIP's own liability insurance has a $1 million deductible. When a claim is filed against AIP, and AIP seeks insurance coverage for the claim with XYZ Corporation's insurance company, XYZ's insurance company denies the claim, arguing that the "Other Insurance" clause in the CGL policy sold to XYZ Corporation requires AIP's *own* insurance to cover the claim.

Other Insurance

In such a scenario, most courts would likely reject the insurance company's argument and hold that the "other insurance" clause is inapplicable, at least as to the first $1 million in defense costs and

indemnification obligations incurred by AIP. In fact, the clear majority of courts have held that neither a "self-insured retention" nor a policyholder's qualification as a "self insurer" constitutes "valid and collectible insurance" for purposes of "other insurance" clauses.

Similarly, numerous courts have concluded that a "deductible" is not "valid and collectible insurance" for purposes of "other insurance" clauses. In *Scott v. Salerno*, for example, which involved an automobile accident, at issue was the priority between the insurance policy on the car and the insurance of the employer of the driver. The car insurance company argued that, pursuant to an "other insurance" clause, its responsibility must be prorated with the employer's insurance—which had a $150,000 "retention or deductible." The court rejected this argument, finding that, whether labeled "self-insurance" or a "deductible," the $150,000 was not "insurance":

> While [the employer] may be viewed as a practical matter as being self-insured for the first $150,000 of any loss by virtue of the retention or deductible in the policy, this retention or deductible does not qualify as other insurance under the [insurance policy for the car]…

Claim for Injuries

In *Transport Insurance Co. v. Insurance Co. of North America*, the court was asked to decide whether an insurance policy covering a truck or a policy covering the premises' applied to a claim for injuries sustained by the underlying plaintiff while unloading the truck. The premises policy had a $2 million limit and a $2 million deductible. Because a California statute required that "valid and collectible" premises insurance be construed to be primary to truck insurance, the truck insurance company argued that the premises insurance policy was primary. Because the premises' policy was a mere "fronting" policy, however, the court concluded that "this particular fronting policy is not an insurance policy within the meaning of" the statute:

> Despite being labeled an insurance policy, [the premises insurance company's] $2 million policy limit expressly included a $2 million deductible…Because the total amount of coverage equaled and included the total amount of the deductible, [the policyholder] was effectively uninsured. Since [the premises insurer's] policy does not apply to the loss, this case does not fall under [the California statute].

The court continued by noting the differences between deductibles and insurance policies:

> The facts that the policy limit equaled and included the deductible, [the premises' insurance company] had the discretionary right to pay damages, and [the premises insurance company] had the unconditional right to reimbursement, all distinguish [the premises insurance company's] fronting policy from a classic insurance policy.

Thus, the court concluded the fronting policy was not "valid and collectible" insurance for purposes of the statute. In so ruling, the court also rejected the argument that a policyholder cannot claim the fronting insurance policy is insurance for regulatory purposes and then deny that it is insurance for other purposes.

Additional Named Insured

A similar result was reached In *Gabe's Construction Co. v. United Capitol Insurance Co.* There, an employee of the subcontractor brought an action against both the contractor and subcontractor. The subcontractor was obligated by its contract to make the policyholder an additional named insured under its general liability insurance, but the general liability insurance company denied coverage for the action. After the general contractor's own insurance company settled the underlying action, the general contractor was required under the policy to reimburse its insurance company. The general contractor then brought an action against the subcontractor's insurance company, which claimed it was not liable because of the operation of an "other insurance" clause. This argument was rejected by the court:

> [T]he introductory language makes the "other insurance clause" applicable only if "other valid and collectible insurance is available." Although [the general contractor's insurance company] undertook the defense and made the initial payment to settle the claims, [the general contractor] was

> required to reimburse [its insurance company] for the settlement and defense costs. This essentially leaves [the general contractor] ultimately responsible for the claims. Consequently, [the general contractor] is the real party in interest and there is no other valid and collectible insurance available to cover the losses actually paid by [the general contractor].

Finally, in *State Farm Mutual Automobile Insurance Co. v. Universal Atlas Cement Co.*, at issue was the priority between the insurance policy of a driver of a car involved in an accident and the insurance arrangements of the renter of the car. The renter's insurance policy had a $1 million deductible, claims within which were administered by the insurance company, and the driver's insurance company claimed its policy's limits were, by operation of an "other insurance" clause, excess to this "valid and collectible" insurance. The court rejected this argument, finding "[s]elf insurance, even though administered by someone else, does not fall within this definition and, therefore, is not `other collectible insurance.'"

Conclusion

These cases demonstrate that the deductibles in an Additional Insured's own policies are neither "insurance" nor "valid and collectible insurance" for purposes of the "other insurance" clauses in another party's general liability insurance policies. Accordingly, under the above hypothetical involving AIP and XYZ Corporation, there is no basis for requiring AIP's own liability insurance to contribute any amount of the first $1 million in defense costs or indemnity payments allocable to each of the policy periods of the Additional Insured's policies.■

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