

Special Advertising Section

OUTSIDE PERSPECTIVES

Beware: An Exclusion That Can Cost You Millions In Coverage — Even When Claims Are Being Paid

THE RECENT DECISION IN *DPC Industries, Inc. v. American International Specialty Lines Insurance Co.*, 615 F.3d 609 (5th Cir. 2010) illustrates the harsh fact that policyholders should not always breathe a sigh of relief when

Cort T. Malone
Cassandra C. Théano

an insurance company initially accepts coverage for a claim. *DPC Industries* involved a chlorine gas leak at a facility in Missouri, which ultimately led to over \$10 million in defense and indemnity liabilities for the policyholder companies. Although the policy's general liability coverage part (Coverage A) had limits of \$11 million, the insurance company (AISLIC) was able to reduce its obligation to \$5 million by accepting coverage only under the policy's pollution coverage part (Coverage D) — despite the fact that the claims potentially fell under either coverage part. Under the policy terms, the court held that the insurance company had the right to decide under which part it would accept coverage.

Once AISLIC accepted and paid claims under Coverage D, the court held that the policy's "covered by other coverages" exclusion prevented the policyholders from accessing the additional Coverage A

limits — or even the difference between the limits of the two coverage parts. Sometimes referred to as an "anti-stacking" exclusion for multiple coverages, this provision can have disastrous effects for policyholders — especially those facing sudden, catastrophic liabilities and needing an immediate response from their insurance companies. Such situations give the insurance company all the leverage in choosing among potentially applicable coverage parts, and possibly costing policyholders millions of dollars in otherwise available limits.

What to Look for and How to Protect Yourself

The other coverages exclusion prevents stacking of multiple potentially applicable coverage parts within the same policy. This exclusion is illustrated by *DPC Industries*, where the policyholder was barred from obtaining coverage under the greater limits of Coverage A, the general liability part, because AISLIC accepted coverage under Coverage D's pollution liability part, which had less than half the total limits of Coverage A. The general facts of *DPC Industries*, in which an unexpected, catastrophic loss allowed AISLIC to dictate the policy part under which it would provide coverage,

could easily arise in any industry. And now that the Fifth Circuit has upheld this damaging exclusion, policyholders will need to be that much more careful in how they submit claims and vigilant about how the insurance company agrees to pay them. Anything less could lead to losing out on millions of dollars of potentially available coverage.

AISLIC's other coverages exclusion to Coverage A states that the insurance does not apply to:

Any claim or part thereof which may be alleged as covered under this Coverage of this Policy, if we have accepted coverage or coverage has been held to apply for such claims or part thereof under any other Coverage in this Policy.

DPC Industries, 615 F.3d at 611. Other insurance companies may use different language for their other coverages exclusions, but the key is to review your policies (or better yet, have your broker or coverage counsel review them) for any exclusions or provisions that limit application of any coverage part based on acceptance of coverage or payment under another coverage part. Such review is critical both for insurance policies currently in effect and any potential new or renewal policies.

Recommendations When Purchasing or Renewing Coverage

If you are purchasing new coverage or renewing an existing policy, the ideal result would be obtaining a policy with no exclusions for claims covered by other coverages. If, however, an insurance company insists on such an exclusion, and business reasons dictate remaining with that company, the best solution is to include language or an endorsement allowing the policyholder to choose the applicable coverage part where multiple coverages might apply. Such language would protect policyholders from the result in *DPC Industries*, where the Fifth Circuit found that the policy language permitted AISLIC to decide which coverage to apply to the claims. Maintaining the right to choose the applicable coverage would ensure that policyholders have the option of selecting the coverage part with greater limits, while still protecting the insurance company from having to pay multiple limits for the same claim.

Recommendations When Submitting Claims Under Existing Coverage

If you already have a policy that includes an other coverages exclusion, submission of claims to which multiple coverages may apply likely will be a delicate endeavor, particularly if there is a dramatic difference in the available limits under the potentially applicable coverage parts. The first step is to request coverage under the policy part with the higher limits. The best-case scenario is that the insurance company agrees to provide coverage either specifically under the requested coverage part, or without specifying the policy part under which it is paying. In the latter scenario, the policyholder would have a strong argument in any subsequent dispute that the insurance company is bound by the policyholder's choice of coverage, because the insurance

company never refuted the policyholder's submission of the claims and request for coverage under a specific policy part.

In the more likely scenario, as demonstrated by *DPC Industries*, the insurance company will respond by denying coverage under the policy part with the higher limits, but accept coverage under another part with lower limits. This situation presents a difficult choice for a policyholder who likely needs the insurance funds with some degree of urgency, and may not be able to fight its insurance company at the same time it is dealing with the underlying claims. If money is no object, however, one option is to refuse the insurance company's acceptance of coverage under the lower limit coverage and immediately bring a lawsuit seeking a declaration that the higher limit coverage potentially applies and that the policyholder has the right to choose its coverage. In the alternative situation, where the policyholder has little choice but to accept the insurance company's selection of applicable coverage in order to recoup necessary funds incurred in defense of the underlying claims, there is at least one measure of protection that can be employed. The policyholder should turn the tables by responding to the insurance company's choice of coverage with a policyholder reservation of rights letter that would at least attempt to preserve for the future the battle as to the properly applicable coverage.

Conclusion

DPC Industries sets a potentially harmful precedent for policyholders with an other coverages exclusion in their policies. Many industries and companies are subject to various accidents or losses that might fall within multiple coverages under their policies, and there are often dramatic differences in the available limits under these various coverage parts. A policyholder who has conducted

a thorough review of all policies for the presence of this exclusion, and is careful and vigilant about submission and payment of claims, will be better positioned to receive the benefit of the full limits of its policies and not discover too late that millions of dollars in policy limits were unattainable.

Cort T. Malone and Cassandre C. Théano are attorneys in the New York office of Anderson Kill & Olick, P.C. They regularly represent policyholders in insurance coverage disputes. Mr. Malone can be reached at (212) 278-1382 or cmalone@andersonkill.com and Ms. Théano can be reached at ctheano@andersonkill.com or 212-278-1468.

Anderson Kill is pleased to announce the opening of their Stamford, CT office at 1055 Washington Blvd., Suite 510. The firm's reputation for being the finest policyholder law firm in the United States is unsurpassed. In addition to insurance recovery, the Stamford office brings to you extensive experience in the fields of corporate, merger and securities transactions and corporate and commercial litigation and estate planning. For more information, please contact Charles T. Lee, Managing Shareholder, at (201) 388-7950 or clee@andersonkill.com.



**ANDERSON KILL
& OLICK, P.C.**
Settle for Everything®