



This, That, and the Other: Different Insurance Policies Can Cover the Same Loss

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Written by Kenneth M. Gorenberg

As policyholder counsel, we're frequently asked which insurance policy may cover a particular claim. Sometimes, the answer is not just one but more than one.

How a Claim Can Be Covered By More Than One Policy

There are several circumstances in which more than one policy may respond to a given claim.

For example, in compliance with a contract between Companies A and B, Company A may have made Company B an "additional insured" on a policy carried by Company A. A claim against Company B may thereby be covered by both B's own policy and the one purchased by A. The same contract may require A to provide a certificate of insurance to B, identifying A's policy. That may allow B to provide notice directly to A's insurance company as well as B's. Depending on the requirements of the contract between A and B, as well as the policy language and the law in some jurisdictions, B may even be allowed to target its tender to A's insurer as the only one to cover the claim, leaving B's own policy essentially untouched.

Another possibility is that Company X may have purchased more than one policy for itself that potentially covers the same loss.

For example, an architectural or engineering firm typically carries both commercial general liability (CGL) and professional liability (PL) (also known as errors and omissions (E&O)) insurance. Depending on the allegations and any facts that may be proven about something that goes wrong on a job, both policies may cover the claim. That's particularly likely if a lawsuit alleges only general negligence rather than professional negligence, even though much of Company X's work may be considered professional in nature. Company X should consider notifying both its CGL and PL insurers.

How Multiple Insurance Policies May Interact In Covering a Claim

When more than one policy can cover a given loss, another issue is how the policies interact to determine which insurance company pays what portion or in what order. Many policies actually anticipate this situation.

In our earlier example regarding Companies A and B, their contract may require that A's policy will be "primary and non-contributory." A's policy, if it complies with that requirement, probably will have an endorsement that says, in effect, it will cover B up to the dollar limit of A's policy, and B's policy does not have to contribute unless A's insurer paid its entire limit.

An insurance policy may also contemplate the existence of another policy by including an "other insurance" provision. This clause comes in one of basically three varieties.

- A so-called “pro rata” clause states that multiple insurance policies will contribute simultaneously, perhaps in equal amounts or prorated according to the dollar limits of liability in the respective policies
- An “excess” provision states that the policy becomes excess, paying only after the other policy has been fully paid and only to the extent the loss exceeds the limit of the other policy
- An “escape” clause says that policy will not provide coverage, allowing that insurer to escape liability entirely if there is another policy that covers the same loss

Importantly, the “other insurance” provisions of all triggered policies must be considered. One can imagine that they might conflict. For example, if two policies have “excess” clauses, it’s obviously impossible for each policy to operate in excess of the other. In that situation, applicable state law generally provides a default rule for the two policies to share the loss, with neither being excess of the other.

Takeaways

When thinking about which policy may cover a claim, consider the possibility that multiple policies may apply. It’s at least worth looking at more than one policy, including various types, seemingly different policy periods, or even those purchased by other companies. While it may seem daunting to analyze or strategize about the availability of coverage under more than one policy, that’s usually a good problem to have.



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