

## **I. The Selective Tender Rule Under *John Burns Construction v. Indiana Insurance Co.***

Where an insured has multiple policies providing coverage for a claim, the insured may designate which of its insurers will defend the case. The duty to defend falls solely upon the selected insurer, and that insurer may not in turn seek equitable contribution from the other insurers who were not designated by the insured.

Duty to defend is normally triggered by insurer receiving actual notice of lawsuit. Insured must make clear that it does not wish to invoke coverage from particular insurer before that insurer is relieved of a duty to defend.

Selected insurer may not seek to share defense costs with other insurers under policy's "other insurance" clause if insured has refused to invoke coverage under other insurers' policies.

*John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill. 2d 570, 727 N.E.2d 211 (2000).

### **Ramifications for claims handling:**

Under the selective tender rule, if the claims adjuster wishes to tender an insured's defense to another carrier, either to obtain contribution to defense costs or to shift the entire defense to the other carrier under an excess clause (see below), the adjuster should first determine whether the insured has refused to invoke coverage. If the insured has notified its other insurers of the claim, or if the insurers otherwise have received actual notice, their duty to defend has been triggered. Under the *Burns* decision, the insured must specifically instruct the other insured not to involve itself in the litigation, or must otherwise make clear to the insurers that it specifically wishes only one insurer to provide a defense, in order to defeat the "other insurance" clause's sharing requirements. Thus, if the insured has notified its other insurer of the claim and has failed to specify which insurer it wishes to provide a defense, the adjuster may request sharing from the other carrier, unless otherwise directed by the insured.

## **II. Other Insurance Clauses**

"Other insurance" clauses generally fall into three categories: 1) "pro rata" clauses, which provide that the insurer will be liable only for the proportion of the loss represented by the ratio between its policy limit and the total limits of all available insurance; 2) "excess" clauses, which allow coverage only over and above the coverage of other insurance; and 3) "escape" clauses, which hold the policy null and void with respect to any loss as to which other insurance exists. *Putnam v. Amsterdam Casualty Co.*, 48 Ill. 2d 71, 269 N.E.2d 97, 99 (1970).

Examples:

**Pro Rata Clause:**

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

\* \* \*

b. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach, each insurer contributes equal amounts until it has paid its applicable limits of coverage or none of the loss remains whichever comes first \* \* \*

**Excess Clause:**

If the insured has any other insurance for claims covered hereunder, the insurance provided by this policy shall be excess over such other insurance, regardless of whether such other insurance is collectible or designated as primary or excess.

**Escape Clause:**

If any other Assured included in this insurance is covered by valid and collectible insurance against a claim also covered by this Policy, he shall not be entitled to protection under this Policy.

**Construction of Conflicting Other Insurance Clauses:**

When an insured has multiple policies applicable to a loss, and each policy contains an “other insurance” clause, there are six possible combinations:

- 1) Pro rata v. Pro rata
- 2) Excess v. Excess

- 3) Escape v. Escape
- 4) Pro rata v. Excess
- 5) Pro rata v. Escape
- 6) Excess v. Escape

Rules of construction followed by Illinois courts:

Identical clauses in both policies – pro rata v. pro rata, excess v. excess, and escape v. escape:

The other insurance clauses are deemed incompatible and cancel each other out. Both insurers are required to share pro rata in defense and indemnity costs.

Different clauses in each policy – pro rata v. excess, pro rata v. escape, or excess v. escape:

**Pro rata v. Excess:** Both clauses are given effect; the policy containing the pro rata clause is primary, while the other policy is excess.

**Pro rata v. Escape:** Both clauses are given effect; the policy containing the pro rata clause is primary, while the policy with the escape clause does not provide coverage.

**Excess v. Escape:** The excess clause is given effect, and the escape clause does not apply. The policy with the escape clause provides primary coverage, because the policy with the excess clause is not “other valid and collectible insurance” within the meaning of the escape clause.

*Putnam v. New Amsterdam Casualty Co.*, 48 Ill. 2d 71, 269 N.E.2d 97 (1970); *New Amsterdam Casualty Co. v. Certain Underwriters at Lloyds, London*, 34 Ill. 2d 424, 216 N.E.2d 665 (1966); *US F & G Co. v. Alliance Syndicate, Inc.*, 286 Ill. App. 3d 417, 676 N.E.2d 278 (1<sup>st</sup> Dist. 1997); *North American Specialty Insurance Co. v. Liberty Mutual Insurance Co.* 297 Ill. App. 3d 595, 697 N.E.2d 247 (1<sup>st</sup> Dist. 1998).

### III. Additional Insured Endorsements

Generally standard form endorsements, although variations in different policies.

May contain either schedule of identified additional insureds, or be “blanket” endorsement providing additional insured coverage to defined class of persons – e.g., those to whom the

named insured is obligated by a written contract to provide insurance.

May limit scope of coverage to additional insureds – e.g., excess coverage only unless specifically required by contract to provide primary, noncontributory coverage.

“Arising out of” limitation – limits coverage for additional insured to liability arising out of the named insured’s operations, premises leased to named insured, or named insured’s products sold in the regular course of the additional insured’s business.

“Arising out of” limitations are broadly construed in favor of the additional insured. An additional insured will have coverage for its own negligence, whether the named insured was negligent or not, so long as the additional insured’s liability arises out of the named insured’s operations. The phrase, “arising out of” requires only a showing that the additional insured was engaged in work it was hired to perform for the named insured, or was in some way participating in the named insured’s operations. *Liberty Mutual Insurance Co. v. Westfield Insurance Co.*, 301 Ill. App. 3d 49, 703 N.E.2d 439 (1<sup>st</sup> Dist. 1998). Since the phrase "arising out of" is both broad and vague, such language must be liberally construed in favor of the insured and a "but for causation", not necessarily “proximate causation”, satisfies this language. *Maryland Casualty Co. vs. Chicago and Northwestern Transportation Co.*, 126 Ill. App. 3d, 150, 466 N.E. 2d 1091 (1<sup>st</sup> Dist. 1984).

### **Ramifications for claims handling**

Due to the complexity of these issues we may often have to deal with another adjuster or attorney who may not have a great deal of experience or knowledge in these additional insured issues. Our recommendation is to focus on the literal language of the endorsements and pay particular attention to the "primary and noncontributory" language which is now frequently included in policies. If this language is used, the other carrier or carriers may have primary responsibility for defense and indemnity even in a case with similar “other insurance” clauses.

Additionally, the insured must be aware of potential conflicts of interest, which may arise when the carrier under the additional insured policy chooses counsel. There may be a reservation of rights applicable to that defense which could give rise to a right by the insured to pick its own lawyer. Both the insurance carrier under the additional insured endorsement and defense counsel chosen by them should be aware of this ethical limitation. If one or more carriers under the additional insured endorsement maintains a reservation of rights, it is possible that the carrier under the named insured policy could have its own defense counsel continue the defense of the case, but with their fees paid by the additional insured carrier(s).

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