Portfolio Media. Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Managing Multiple Coverage Claims — Part I

Law360, New York (January 30, 2009) -- Your insurance company client calls you to say he has a coverage issue for you to solve. Someone has made a claim against him and he wants to know how to coordinate his insurance policies to cover the matter.

A couple of days later, he walks into your office, throws a stack of policies on your desk, wheels around and leaves without saying a word. Bewildered, you think, "OK." You grab your research file from the last question and think, "Where do I begin?"

That's when you look at the Rubik's Cube sitting on your bookshelf and say to yourself, "No problem. I just have to line up my colored sides properly."

Sorting through the stack, the first policy you look at offers $1 million of primary coverage for an occurrence. Next is an excess policy with $5 million of coverage. The third policy provides $1 million of coverage for an occurrence, but this policy's "other insurance" provision makes it excess to all coverage provided by any and all other insurance policies of any sort. The stack includes several policies, both primary and excess, with sequential, consecutive effective policy periods.

So how do you go about determining the priority of coverage under this scenario? The issues you need to analyze are like the colors on the tiles of a Rubik's Cube. The various colored sides of this Rubik's Cube include "other insurance" provisions, the nature and level of the coverage provided by the insuring agreement, horizontal versus vertical exhaustion and choice of law.

Orange Squares: "Other Insurance" Provisions

Remember that your last assignment involved analyzing "other insurance" provisions, you decide to start with what you know. Your prior research reminds you of the three different types of "other insurance" provisions – pro rata, escape and excess.

A pro rata clause limits the insurer's liability to its pro rata share of the loss in the proportion that its policy limits bear to the aggregate of available liability coverage. Horace Mann Ins. Co. v. General Star National Insurance Company, 514 F.3d 327, 330 (4th Cir. 2008) (citing State Farm Mut. Auto. Ins. Co. v. U.S. Fidelity & Guar. Co., 490 F.2d 407, 410 (4th Cir. 1974).

An escape clause means that the policy provides no coverage to the insured if there is coverage available under another policy. Id. Finally, an excess clause means that the policy only provides coverage if the limits of other available insurance are exhausted. Id.

If all the policies contained pro rata clauses, the answer would be easy enough: each policy would pay its pro rata share. Similarly, where you can reconcile competing "other insurance" clauses, your answer is likely to be straightforward.

An excess clause typically trumps a pro rata clause, allowing the excess policy to withhold coverage until the pro rata policy is exhausted. See, e.g., Consolidated Ins. Co. v. Bankers Ins. Co., 244 Md. 392, 223 A.2d 594 (1966). Likewise, generally speaking, an escape provision prevails over pro rata or excess provisions.

Your analysis is much trickier where the policies at issue contain "other insurance" provisions that, by their terms, actually conflict with each other.

For example, if you compared two applicable policies that both contained escape clauses, each insurer would point to the other insurer's policy and say, "we don't owe the insured any coverage."

If both policies contained excess clauses, each insurer would point to the other policy and say, "no coverage until the other policy is exhausted." You pull out the Horace Mann case from your research file because you remember it discussed how courts approach conflicting "other insurance" provisions.

Courts employ a couple of methods to analyze conflicting "other insurance" provisions that, if applied as written, would leave the insured with no coverage.

Many courts find the conflicting "other insurance" provisions to be "mutually repugnant," and rule that the insurers must pay pro rata shares of the total liability. Horace Mann Ins. Co., 514 F.3d at 331, citing State Farm, above, 490 F.2d at 410; Hoffmaster v. Harleysville Ins. Co., 657 A.2d 1274, 1277 (Pa. Super. Ct. 1995).

You remember a similar Maryland case, Centennial Ins. Co. v. State Farm Mut. Auto. Ins. Co., 71 Md. App. 152, 163, 524 A.2d 110, 116 (1987) in which the court found the conflicting "other insurance" provisions "mutually repugnant and nugatory." "Nugatory," you think, "that's a good word."

Other courts, the Horace Mann case notes, resolve the conflicts by considering the "total policy insuring intent" approach.

Under this analysis, where a court cannot use the "logic of [the competing provisions'] terms, the insurer whose coverage was effected for the primary purpose of insuring the particular risk should be primarily liable for payment, with the insurer whose coverage was most incidental to risk being liable last."

Horace Mann Ins. Co., 514 F.3d at 331, quoting 15 Russ & Segalla, Couch on Insurance § 219:49, and citing as an example Integrity Mut. Ins. Co. v. State Auto. & Cas. Underwriters Ins. Co., 239 N.W.2d 445, 446-47 (Minn. 1976).

In Horace Mann, two of the policies contained excess "other insurance" provisions. One of the excess clauses provided that:

"[I]f other valid and collectible insurance with any other insurer is available to the insured covering a loss also covered by this Policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance."

The other excess clause provided that the policy:

"Was written and priced to reflect the intent of all parties that this policy is in excess of any and all other insurance policies ... whether primary, excess, umbrella or contingent [and that this policy's coverage] does not apply if the insured has other valid and collectible insurance of any kind whatsoever whether primary or excess ..."

Your initial reaction might be, "That's easy, the first excess clause recognizes it might not always be excess where the second one is always excess where there is other valid insurance. Therefore, the first one pays until the limits are exhausted and then the second one pays."

But if that was your reaction then you, like the trial court judge in Horace Mann who agreed

with you, are wrong. You failed to consider the next set of colored squares on your Rubik's Cube, the nature and level of the coverage provided by the policies.

Purple Squares: The Nature And Level Of Coverage

In Horace Mann, the 4th U.S. Circuit Court of Appeals faulted the district court judge for merely comparing competing "other insurance" provisions without regard to the nature of the policy's coverage as set forth in the insuring agreement. "I knew that!" You slap your forehead. "Why can't I remember it? You always look at the insuring agreements when analyzing coverage issues!"

A typical insuring agreement might look like this:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result ... No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided under Supplementary Payments — Coverages A and B.

Analyzing that insuring agreement would be simple enough if it were the only policy provision involved in your analysis. But you have a whole stack of policies on your desk, and you need to know what types of coverages are granted by the various insuring agreements.

For example, a "true excess" or "pure excess" policy is one whose insuring agreement grants only excess coverage and never provides primary coverage. A "coincidental excess" policy provides primary liability coverage but operates as an excess policy under certain circumstances by virtue of its excess "other insurance" provision.

The Horace Mann case involved a true or pure excess policy and a coincidental excess policy. In discussing the true excess policy, the Fourth Circuit said, "coverage under [that] policy is dependent upon the exhaustion of the limits of underlying primary liability insurance, and this kind of dependence on an underlying liability policy is the hallmark of a true excess policy." Horace Mann, 514 F.3d at 333.

Commenting on the coincidental excess policy, the 4th Circuit said the "policy provides that it will pay 'on behalf of the insured any and all [covered losses] (sic) subject to the limit of liability." Horace Mann, 514 F.3d at 333.

Unlike the true excess policy, the coincidental excess policy "does not require that the insured maintain other insurance and neither the declarations nor the insuring agreements limit coverage to losses in excess of the limits of an underlying insurance policy." Id., citing Gauze v. Reed, et al., 633 S.E.2d 326, 333 (W. Va. 2006).

"Because the other-insurance clause does not make coverage in all cases dependent on the exhaustion of the limits of an underlying policy," the 4th Circuit continued, "the other-insurance clause does not transform the policy into a true excess policy."

Id. at 333-34, citing Fireman's Fund. Ins. Co. v. CNA Ins. Co., 117 Vt. 215, 862 A.2d 251, 266 (2004); CNA Ins. Co. v. Selective Ins. Co., 354 N.J. Super. 369, 807 A.2d 247, 254 (2002); Bosco v. Bauermeister, 456 Mich. 279, 571 N.W.2d 509, 514 (1997); North River Ins. Co. v. American Home Assur., 210 Cal.App.3d 108, 257 Cal.Rptr. 129, 131 (1989).

The Horace Mann court concluded that the "true excess" versus "coincidental excess" distinction disposed of the matter. The 4th Circuit predicted that the West Virginia Supreme Court, which had not yet spoken on the issue, would follow the general rule as set forth in Monroe Guar. Ins. Co. v. Langreck, 816 N.E. 2d 485, 492-93 (Ind.App. 2004):

"[N]umerous courts in other jurisdictions have addressed the question and have aligned themselves with the position [the excess insurer] takes: a true excess insurance policy is secondary in priority to a primary insurance policy, even with respect to an incident for which the primary policy purports to make itself excess ato any other available insurance ...

"Indeed, it appears that not only is this the majority rule, but the practically universal rule in jurisdictions that have addressed the issue. Otherwise stated, the prevailing rule is that umbrella insurance coverage is "true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses." Horace Mann, 514 F.3d at 334-35.

"Practically universal?" You scratch your head. "Is that like 'somewhat unique' or 'virtually pain free'?"

The rule, therefore, is that true excess is always excess over a policy providing primary coverage. Horace Mann Ins. Co., 514 F.3d at 335-36. This rule applies without regard to "other insurance" provisions because "other insurance" provisions are an issue only at the same level of coverage. Id.

In any event, you now know you must make sure you understand the different levels of coverage with which you are dealing before you can start comparing "other insurance" provisions. What "other issues" should you consider in determining the coordination of policies? Horizontal versus vertical exhaustion looks like it is the next issue making up a colored side to your Rubik's Cube.

--By James P. Steele (pictured) and William J. Carter, Carr Maloney PC

James Steele is a member of Carr Maloney in the firm's Washington, D.C., office. William Carter is a director and officer at the firm in the Washington office.

The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.
