TRAUB LIEBERMAN

April 12, 2016

California Court Rejects Primary Carrier's Excess Other Insurance Position

In its recent decision in *Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co*., 2016 Cal. App. LEXIS 275 (Cal. App. Apr. 11, 2016), the Court of Appeal of California for the Third Appellate District had occasion to consider the application of other insurance clauses in the context of successive primary general liability insurance policies.

Arch and Underwriters insured Framecon under successive primary general liability policies: Arch for the period October 28, 2002 to October 28, 2003 and Underwriters for the periods October 28, 2000 to 2001 and October 28, 2001 to October 28, 2002. These were Framecon's only general liability policies for this three year period.

Framecon was named as a defendant in a constructive defect lawsuit involving its work on a housing development in California. The suit alleged progressive property damage occurring during all three policy periods. While Underwriters agreed to provide Framecon and an additional insured with a defense, Arch took the position that its defense obligations were excess over Underwriters'. Arch's position was based on language in its policy's insuring agreement stating that:

> We have the right and duty to defend you, the Named Insured, against any suit seeking tort damages provided that no other insurance affording a defense against such a suit is available to you.

The Arch policy also contained an excess other insurance clause stating that:

> 1. Excess Insurance
>
> This insurance is excess over any other insurance, and over deductibles or self-insured amounts applicable to the loss, damage, or injury, whether such other insurance is primary, excess, contingent or contributing and whether an insured is a named insured or additional insured under said policy.
>
> When this insurance is excess, we will have no duty under Coverage A or B to defend any claim or suit that any other insurer has a duty to defend.

Arch did not contest an indemnity obligation under the policy, and in fact paid a proportional share of the underlying settlement, and it funded its allocable share to settle other similar claims. It nevertheless maintained that in light of its policy's provisions, it had no defense obligations since Underwriters were providing a defense.

Underwriters subsequently brought an equitable contribution claim against Arch. At the trial court level, Arch was granted summary judgment based on the court's finding that the other insurance clause relieved its of a duty to defend, reasoning that the Arch policy's other insurance clause was not a prohibited escape clause because it was contained in the policy's insuring agreement.

On appeal, however, the court observed that the purpose of "other insurance" clauses is to prevent multiple recovery by insureds in cases of overlapping policies providing coverage for the same loss, but that public policy disfavors "escape clauses." The court further observed that modern trend in California requires equitable contributions on a pro rata basis from all primary insurers, regardless of their respective other insurance clauses.

© Traub Lieberman Straus & Shrewsberry LLP

Arch argued that this general case law, and that California jurisprudence disfavoring excess only clauses in primary policies, should be disregarded because the language concerning its defense obligations was in its policy's insuring agreement rather than as a condition. The court was not persuaded by this argument, noting that California case law disfavoring escape or excess other insurance clauses is not premised on whether the language is stated as a condition or as a term of coverage, but instead speaks to a more general public policy concern. As the court explained:

> Here too, Arch's policy made Arch liable for defense costs, but then purported to extinguish that obligation when other insurance afforded a defense ("We have the . . . duty to defend you . . . provided that no other insurance" is available.) Here too, enforcing Arch's clause would result in imposing on Underwriters the burden of shouldering a portion of defense costs attributable to claims arising from a time when Arch was the only insurer. Here too, the "other insurance" provision was an escape clause that must be disregarded.

Thus, finding that it would be unfair to burden Underwriters with the entirety of the defense simply because of the other insurance clause in the Arch policy, the court held that Arch was required to contribute to the defense on a pro rated basis.

© Traub Lieberman Straus & Shrewsberry LLP