TRAUB LIEBERMAN

INSURANCE LAW BLOG

September 1, 2021

Federal Court Enforces "Limits" and "Most We Will Pay" Clauses in Additional Insured Endorsement

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In the recent case of *Zurich Am. Ins. Co. v. XL Ins. Am., Inc.*, 20-CV-4614 (LJL), 2021 WL 3617218 (S.D.N.Y. Aug. 16, 2021), the United States District Court for the Southern District of New York—in deciding a motion for consideration—had occasion to review the 2013 ISO changes to the additional insured endorsement, and held that coverage under a policy providing additional insured coverage was limited to the $1,000,000 required by contract, and not the $2,500,000 limit to the policy.

In *Zurich*, Zurich and its named insured D.A. Collins sought the full limits of the primary policy issued by XL to the D.A. Collins' subcontractor, HBI, which are $2,5000 per occurrence and in the aggregate, for an underlying personal injury lawsuit. XL also issued an excess policy in the amount of $5,000,000 to HBI.

The contract between D.A. Collins and HBI required HBI to obtain commercial liability coverage "in an amount of $1,000,000 per occurrence and $2,000,000 in the aggregate. It further provides that the "required limits for the umbrella excess coverage shall be sufficient to provide a total of $5,000,000 per occurrence/aggregate."

The additional insured endorsement in the XL primary policy specified that 1) coverage shall not be broader than that which HBI is required by contract or agreement (the "Broader Clause"); 2) limits shall be the lesser of the limits in the policy and the limits required by contract or agreement (the ("Limits Clause"); and 3) the most XL will pay shall be the lesser of the limits in the policy and the limits required by contract or agreement (the "Most We Will Pay Clause").

Initially, the court held that under the Broader Clause, coverage was limited to $1,000,000. Zurich moved for reconsideration, arguing that the Broader Clause defines the scope of coverage and not the amount of coverage. Upon reconsideration, the court agreed but held that under both the Limits Clause and Most We Will Pay Clause, the amount of insurance available is the lesser of the amount provided in the XL primary policy or the amount provided by the additional insured contract.

XL argued that because a total of $6,000,000 of coverage was required by the contract ($1,000,000 primary and $5,000,000 excess), the full $2,500,000 limit of the XL primary policy should be made available. However, the court held that the plain language of the contract requires only $1,000,000 in primary coverage. "The HBI Subcontract requires HBI only to acquire 'umbrella/excess coverage ... sufficient to provide a total of $5,000,000 per occurrence/aggregate.' It does not require HBI to acquire a primary policy in the amount of $6 million or a combination of policies that totals $6 million." As such, the court denied the motion for consideration.

The court also held that XL's excess policy was not primary to the Zurich policy issued to D.A. Collins, because the XL excess policy was not triggered in the first place due to the fact that the XL primary policy would not be exhausted by payment of its full limits.

The *Zurich* case illustrates the need to carefully review the wording of contracts with respect to required limits of insurance. As the court pointed out, simply requiring that the insured obtain a combined amount of policies in the amount of $6,000,000 would have allowed D.A. Collins access to the full amount of the XL primary policy. Other cases have permitted access to full limits when the requirement for the primary policy is “at least” or “not less than” $1,000,000 per occurrence. However, because D.B. Collins/HBI contract specifies a specific limit for general liability insurance, only that limit was available under the Limits Clause and Most We Will Pay Clause.