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INSURANCE LAW BLOG

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Middle District of Florida Disregards Other Insurance Clause Where Subcontractor Contractually Promised to Indemnify General Contractor

BY:

In *Clear Blue Ins. Co. v. Gemini Ins. Co.,* No. 8:22-cv-1711-TPB-AEP, 2024 U.S. Dist. LEXIS 57340 (M.D. Fla. Mar. 29, 2024), the Court was faced with competing summary judgment motions with each party arguing coverage under the others' policy applied after the subcontractor's primary policy was exhausted.

CPWR LLC, d/b/a Capital Contractor Services ("CCS") contracted with Edgewater Restoration Services ("Edgewater") to perform work on the outside of a high-rise building which required the use of a suspended platform. An independent contractor of Edgewater was injured while on the platform and brought suit against CCS and Edgewater. The independent contractor's claims against CCS were based on CCS' direct liability as well as its vicarious liability for the negligence of Edgewater. CCS was insured by Gemini, and Edgewater was insured by Clear Blue via a primary policy with available limits of $1million and an excess policy with limits of $1 million. Clear Blue undertook the defense of Edgewater as its named insured and assumed the defense of CCS as an additional insured of Edgewater pursuant to the contract between the parties. The contract obligated Edgewater to indemnify CCS from claims, liability, damage, losses, and costs arising from the performance of the subcontract, including but not limited to, reasonable attorney's fees, caused in whole or in part by any act, omission, or default or of Edgewater or of CCS, subject to certain exceptions and limitations.

Clear Blue settled the claims against Edgewater—leaving the claims against CCS pending—for $1 million, which exhausted the primary policy but continued to defend CCS in the underlying action. Clear Blue argued, however, that its duty to defend CCS ended with the exhaustion of its primary policy and it was owed reimbursement from Gemini for costs incurred for defending CCS after such exhaustion. Clear Blue's basis for this contention was that the "other insurance" provision of its excess policy trumps the "other insurance" provision in the Gemini policy making the Gemini policy the next layer of coverage for CCS once Clear Blue's primary policy was exhausted. In response, Gemini argued that the "other insurance" provision in its policy issued to CCS rendered Clear Blue's excess policy the next layer of coverage for CCS and that not only did Clear Blue have an ongoing duty to defend and indemnify CCS, but also that Clear Blue owed reimbursement to Gemini for defense costs paid on behalf of CCS prior to Clear Blue's assumption of CCS's defense.

Clear Blue instituted a coverage action against Gemini and CCS asking the court to declare the rights of the parties and upon competing summary judgment motions, the question before the Court was: "whether, upon exhaustion of the Clear Blue primary policy, Gemini's policy or the Clear Blue's excess policy became responsible for the cost of defending CCS against Hippolyte's claims in the underlying suit."

In beginning its analysis, the Court remarked on the tedious task of resolving competing "other insurance" provisions, remarking:

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> *"It has been observed that the resolution of competing "other insurance" clauses "is an area in which hair splitting and nit picking has been elevated to an art form. 'Other insurance' clauses have been variously described as: 'the catacombs of insurance policy English, a dimly lit underworld where many have lost their way,' a circular riddle, and 'polic[ies] which cross one's eyes and boggle one's mind.'" … From its previous experience attempting to reconcile competing "other insurance" clauses, the Court is inclined to agree with these sentiments. In this case, however, the Court need not descend into the "underworld" or even the "catacombs" to address the vagaries of "other insurance" provisions or the parties' arguments regarding contractual interpretation because the Court concludes that in the narrow factual situation presented here, the "other insurance" clause in Clear Blue's excess policy does not determine the order of coverage."* (Internal citations omitted)

The court surveyed cases[1] interpreting competing other insurance clauses, and reiterated the majority rule that "where, as here, one party has contractually promised to indemnify another, the indemnitor's insurer is deemed to be primarily responsible for coverage of claims against the indemnitee, notwithstanding the inclusion of an 'other insurance' clause in the insurance policy." As such, the court found in favor of Gemini in holding that where a general contractor has indemnity rights against a subcontractor, the priority of coverage follows the indemnity obligation such that the general contractor's coverage applies after the subcontractor's primary and excess policies were exhausted.

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[1] *See* Pavarini Const. Co. (SE) Inc. v. Ace Am. Ins. Co., 161 F. Supp. 3d 1227, 1234-35 (S.D. Fla. 2015) and St.

Paul Fire & Marine Ins. Co. v. Lexington Ins. Co., No. 05-80230-CIV, 2006 U.S. Dist. LEXIS 31397, 2006 WL

1295408, at *4-5 (S.D. Fla. Apr. 4, 2006), where the court disregarded the "other insurance" provisions where an insured party was contractually obligated to indemnify the other.

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