



Insurance Law

Robert J. Winston

Stone & Johnson, Chtd., Chicago

When is an Excess Policy Truly Excess

Recently in *Am. Guar. & Liab. Ins. Co. (AGLIC) v. EXP US Services (EXP)*, the Illinois Appellate Court First District issued a Rule 23 ruling finding that an umbrella insurance policy was a “true excess” policy providing no coverage until all primary policies were exhausted. 2023 IL App (1st) 210821-U.

Underlying Facts

The Illinois Department of Transportation entered into a contract with F.H. Paschen, S.N. Nielsen & Associates LLC (Paschen), as general contractor, and with EXP, an engineering firm, for construction work on the Algonquin Bypass Project. *AGLIC*, 2023 IL App (1st) 210821-U, ¶ 3. Paschen subsequently entered into a subcontract with Arrow Road Construction Company (Arrow). The subcontract required Arrow to purchase certain insurance coverage, including commercial general liability (CGL) insurance with a single limit of not less than \$2,000,000 per occurrence. *Id.* ¶¶ 3-4. Paschen, the Illinois Department of Transportation, and EXP were to be included as additional insureds on the primary policy. *Id.* ¶ 4. The coverage provided to the additional insureds had to be on a primary, non-contributory basis for any liability arising directly or indirectly from the work of the subcontractor.

In addition to the CGL coverage required, the subcontract also required umbrella liability insurance. This coverage was to follow form to all primary coverage requirements as outlined above and had to be provided in an amount not less than \$5,000,000 for each occurrence. *Id.* Paschen, the Illinois Department of Transportation, and EXP again were to be included as additional insureds on this umbrella policy.

Although Arrow was required to maintain a CGL policy in the amount of \$2,000,000 per occurrence, Arrow actually purchased a \$1,000,000 primary CGL insurance policy from BITCO General Insurance Corporation (BITCO). Arrow also purchased a \$5,000,000 umbrella policy from American Guarantee and Liability Insurance Company (AGLIC).

On June 13, 2014, Paul Sitz was injured when his motorcycle struck a raised manhole on the Algonquin Bypass Construction Project. *Id.* ¶ 5. Sitz filed suit against Paschen, Arrow and EXP, among other defendants. As a result of that lawsuit, Arrow settled its own liability to Sitz for \$225,000. *Id.*

EXP was issued a CGL policy by XL Catlin (Catlin). *Id.* ¶ 6. EXP tendered and sought coverage under that policy, but coverage was denied based on a professional services exclusion. *Id.* EXP also had a claims made professional liability insurance policy issued by Lloyd’s Syndicate - Beazley Furlonge Group (Beazley). Beazley did not dispute coverage relating to the claims made against EXP in the Sitz lawsuit. *Id.*

EXP argued that it was an additional insured under the BITCO primary policy because of an endorsement entitled “Transportation Contractors’ Extended Liability Coverage” that allowed additional insureds to qualify under the policy if Arrow was contractually required to include the entity as an additional insured. *Id.* ¶ 7. BITCO disputed EXP’s coverage under the policy and filed a declaratory judgment action regarding its duty to defend or indemnify EXP. That lawsuit was resolved in a settlement. *Id.* The BITCO primary policy paid \$125,000 on behalf of EXP for the Sitz settlement. *Id.*

EXP then sought coverage from the AGLIC umbrella policy because that policy identified the BITCO policy as underlying insurance in an endorsement. *Id.* ¶ 8. EXP alleged because it was an additional insured on the BITCO primary policy, it also qualified as an additional insured on the AGLIC umbrella policy. *Id.* AGLIC denied coverage and filed a declaratory judgment action seeking a declaration that AGLIC did not owe EXP any amount in connection with the Sitz action. AGLIC filed a motion for summary judgment, and EXP filed a cross-motion for summary judgment. *Id.* ¶ 9. The circuit court ruled in favor of AGLIC, finding that the AGLIC umbrella policy was excess to the Beazley professional liability policy, and while the court found that EXP's liability could have been caused, in whole or in part, by Arrow's conduct, the professional services exclusion in the AGLIC policy negated coverage for EXP. *Id.* ¶ 10.

EXP argued on appeal that the circuit court erred by finding AGLIC's umbrella insurance policy only provided excess insurance coverage and was excess to the Beazley policy. *Id.* ¶ 14. EXP also argued that \$1,000,00 of the AGLIC policy must be treated as primary insurance because Arrow did not procure the full \$2,000,000.00 in insurance coverage required by the subcontract. *Id.*

AGLIC argued its policy did not provide indemnity coverage for the settlement payment paid by Beazley because that payment was made to resolve a professional liability claim. *Id.* But more critically, AGLIC argued that even if some portion of the settlement was covered by the AGLIC policy, the AGLIC policy would still be excess insurance over the Beazley primary liability policy for all purposes, particularly any amounts paid on behalf of EXP. *Id.*

The First District's Analysis

Justice Walker, writing for the First District, noted that "the construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court which are appropriate subjects for disposition by way of summary judgment." *Id.* ¶ 15 (quoting *Crum & Forester Manager's Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993)). The court further ruled, citing *Int'l Minerals and Chemical Corp. v. Liberty Mut. Ins. Co.*, 168 Ill. App. 3d 361, 370 (1st Dist. 1988), that contracts of insurance are subject to the same rules of construction applicable to other types of contracts. *Id.* "To ascertain the intent of the parties and the meanings of the words used in the insurance policy, the court must construe the policy as a whole, taking into account the type of insurance for which the parties had contracted, the risk undertaken and purchased, the subject matter that is insured, and the purpose of the entire contract." *Id.* ¶ 16 (quoting *Crum & Forester*, 156 Ill. 2d at 391).

The court noted that there was a difference between a primary insurance policy and an excess insurance policy. Primary insurance coverage attaches immediately upon the happening of an event that gives rise to liability. *Certain Underwriters at Lloyd's London v. Cent. Mut. Ins. Co.*, 2014 IL App (1st) 133145, ¶ 2. True excess coverage, also known as "following form" or "specific" excess insurance coverage, only attaches after the predetermined primary amount has been exhausted, and it provides a secondary level of coverage designed to protect the insured in situations where a judgment or settlement exceeds the primary policy of liability. *Kajima Constr. Serv. Inc. v. St. Paul Fire & Marine Ins. Co.*, 227 Ill. 2d 102, 106 (2007). True excess coverage is purchased by the insured in separate contracts that are written by design. *Kajima*, 227 Ill. 2d at 114. The court also cited *North River Ins. Co. v. Grinnell Mut. Reinsurance Co.*, 369 Ill. App. 3d 563 (1st Dist. 2006), wherein a subcontractor listed as an additional insured claimed the named insured was obligated to contribute to the settlement because the subcontract required the named insured to provide both primary CGL and umbrella coverage for the additional insured. *North River*, 369 Ill. App. 3d at 566-68. The additional insured argued the umbrella coverage was meant to provide coverage that was primary; therefore, the umbrella coverage would drop below the additional insured's own CGL coverage. But the court held that nothing in the subcontract could be

construed as requiring the excess coverage to be exhausted before the additional insured's own primary CGL coverage. *Id.* at 570.

The court found EXP failed to demonstrate where the subcontract indicated the umbrella coverage was required to drop down below the primary policies being obtained by additional insureds. AGLIC's excess policy is entitled: "Coverage A—Excess Follow Form Liability Insurance." The policy provides:

Under Coverage A, we will pay on behalf of the insured, those damages covered by this insurance in excess of the total applicable limits of underlying insurance. With respect to Coverage A, this policy includes:

1. The terms and conditions of underlying insurance to the extent such terms and conditions are not inconsistent or do not conflict with the terms and conditions referred to in Paragraph 2 below; and
2. The terms and conditions that apply to Coverage A of this policy. Notwithstanding anything to the contrary contained above, if underlying insurance does not apply to such damages, for reasons other than exhaustion of applicable limits of insurance by payment of loss, then Coverage A does not apply to such damages.

AGLIC, 2023 IL App (1st) 210821-U, ¶ 28.

The court looked at AGLIC's other insurance provision which held:

If other insurance applies to damages that are also covered by this policy, this policy will apply excess of the other insurance. However, this provision will not apply:

- a. If the other insurance is written to be excess of this policy; or
- b. With respect to Coverage A only, if the named insured has agreed in a written contract to carry insurance to apply prior to and be non-contributory with that of another person or organization's insurance, but only as respect to damages arising out of the insured operations or work on behalf of the named insured performed under such written contract. The limits available to the other person or organization will be the lesser of the policy limits or the minimum limits required by such written contract. In that case, other insurance of that person or organization will apply as excess and not contribute prior to the insurance afforded by this policy. Nothing herein will be construed to make this policy subject to the terms, conditions and limitations of such other insurance."

Id. ¶ 29.

The court then examined premiums generally charged for umbrella coverage and stated that they reflect an intent that umbrella policies serve a different function. The premiums are lower "because excess coverage is, by its very nature, not supposed to be triggered until the underlying policy has been exhausted up to its limits." *Id.* ¶ 29 (quoting *Kajima*, 227 Ill. 2d at 116). Arrow maintained a CGL policy with BITCO and an umbrella policy with AGLIC. *Id.* The subcontract required CGL coverage of \$2,000,000 and umbrella coverage of \$5,000,000. *Id.* Under *Kajima*, there is a presumption that the umbrella policy is true excess. *Id.* The court then noted the BITCO policy stated "coverage provided to an additional insured shall be on a primary, non-contributory basis," but the AGLIC policy did not have such a provision. *Id.* ¶ 31.

While EXP asked the court to find the other insurance provision in the AGLIC policy demonstrated AGLIC was required to provide primary coverage, the court instead looked to the Beazley policy. *Id.* The Beazley policy contained a provision entitled “Defense, Settlement and Investigation of Claims.” *Id.* The provision gave Beazley the right and duty to defend any claim against the insured. *Id.* The Beazley policy also had an “other insurance” provision that stated in part: “This insurance shall apply in excess of any self-insured retention or deductible portion thereof unless such other insurance is written only as specific excess insurance over the limit of liability of this policy.” *Id.*

The court then looked to the analysis of *Capital Constr. Solutions, Inc., et. al., v. Selective Ins. Co. of SC*, 2022 IL App (1st) 200808-U. In that case, a contractor sought defense from a subcontractor’s insurer after a workplace injury. *Capital Constr. Solutions, Inc., et. al.*, 2022 IL App (1st) 200808-U, ¶ 6-11. Selective refused the tender and subsequently another subcontractor’s insurer accepted the defense of the contractor. *Id.* ¶ 11-12. The contractor filed suit seeking an order declaring Selective breached its duty to defend and indemnify. *Id.* ¶ 13. The circuit court granted summary judgment in favor of Selective. *Id.* ¶ 14. On appeal, the First District held “the targeted tender rule did not allow the contractor to tender its defense to an insured that only provided excess coverage. The court analyzed the subcontract at issue and found that the subcontract only required the subcontractor’s insurer to provide excess coverage.” *Id.* ¶ 37.

The court then reviewed the subcontract between Paschen and Arrow and found it required AGLIC to provide umbrella liability coverage; it further found that the language in the subcontract did not require the umbrella coverage to serve as primary insurance. *AGLIC*, 2023 IL App (1st) 210821-U, ¶ 33. The subcontract stated the umbrella coverage will follow form and shall be excess of the underlying policy limits. *Id.*

The court stated, “Following Illinois case law, we find that the AGLIC policy is ‘true’ excess coverage and was not required to provide primary insurance coverage based on either Arrow Road’s failure to procure the requisite \$2 million CGL coverage or Beazley’s settlement of claims against EXP.” *Id.*

Conclusion

This opinion gives a thorough analysis of excess versus primary coverage and why the courts in the State of Illinois are not adopting theories that would turn excess and/or umbrella policies, which have much lower premiums than CGL coverage, into primary coverage.

If you are considering attempting to convince a court that an excess policy should drop down to cover primary limits that were not obtained, you must be familiar with the language in the contract, or in this case, a subcontract, and the “other insurance” clauses of the insurance policies at issue. The court, in its analysis, set forth that it will not obscure the difference between an excess and primary policy unless a thorough analysis of these documents demonstrates that was the intent of the policies. The court in *AGLIC* found no reason to depart from the analysis of the appellate courts and the supreme court in interpreting the purposes of primary and excess policies.

About the Author

Robert J. Winston is a Partner with *Stone & Johnson Chartered* in its Chicago office. He has handled civil litigation matters for 35 years. Mr. Winston has had more than 40 first chair verdicts to date in favor of the client in the areas of construction, medical malpractice and premises liability. He also has more than 80 arbitrations, tried before the Circuit Court of Cook County and the American Arbitration Association. He practices before both the trial and appellate courts on the state and federal level.



Mr. Winston represents businesses, construction companies and subcontractors in personal injury and insurance coverage litigation. He also is involved in contract analysis.

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