

Determining Priority of Insurance Coverage — A Step-By-Step Guide

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When multiple insurers cover the same event or multiple insured parties are involved in a dispute, it becomes necessary to determine priority of coverage, i.e., the order in which insurance is, or may be, obligated to pay. On the plaintiffs' side, this preliminary determination is key to engaging in settlement negotiations or collecting a judgment. For defendants, determining the priority of coverage is imperative to both obtaining a defense and assessing personal exposure. From the standpoint of the insurers involved, no insurer wishes to pay more than it owes or, indeed, has contracted to provide.

Generally, the priority of coverage is governed by policy language and court decisions interpreting that language. See, e.g., Ohio Revised Code 3937.18 (Ohio's uninsured/underinsured motorist statute). Accordingly, insurers craft language to suit the intended coverage. Determining priority of coverage requires careful review and comparison of the specific language in the various policies covering the loss. Although policy language varies, there are certain rules of general application which can assist in the priority of coverage determination. The steps in applying these general rules to determine priority of coverage follow.

Step 1: Determine whether coverage is available under multiple policies.

Generally, this initial determination is governed by the type of loss, the type of coverage afforded under the various policies in issue, and the exclusions contained in those policies. Note that if coverage is not available under multiple policies, then there is no issue of priority of coverage. That analysis does not involve the priority of coverage, but rather, determining whether coverage is available under multiple policies. That determination can be complex and is beyond the scope of this article but focusing on the grant of coverage is often an important first step.

Specifically, some insurers limit the initial grant of coverage (i.e., the definition of "Who Is An Insured") to persons who are "not insured" for losses because no "coverage under another" insurance policy exists. Ohio appellate courts have found such provisions valid because no coverage is afforded in the first instance where other insurance covers the loss. See, e.g., *W. Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 1st Dist No. C-100012, 2010-Ohio-6311, ¶18; *Johns v. Hopkins*, 8th Dist. No. 992182013-Ohio-2099. Thus, a good starting point in determining priority of coverage is looking to the definition of "Who Is An Insured" to determine if it has such a limitation.

Although such limitations have generally been found valid by Ohio's Courts of Appeals, limitations on the initial grant of coverage have not yet been directly analyzed by the Supreme Court of Ohio. One remaining issue is whether the Supreme Court of Ohio would find that limiting the initial grant of coverage to those without other insurance coverage is analogous to an "escape clause." In *State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co.*, 23 Ohio St. 2d 45, 46 (1970), the Supreme Court addressed an "escape clause" that provided coverage "but only if no other valid and collectable ... insurance, either primary or excess ... is available to such person." The Supreme Court reasoned that, because excess insurance is not "collectable" until primary insurance is exhausted, there is no "other valid and collectable insurance" at the primary level and the "escape clause" does not apply. The policy with the "escape clause" was thus found primary to excess insurance. It is unclear whether the Supreme Court would apply similar analysis if faced with a conflict between: an excess insurance provision; and a clause limiting the definition of "Who Is An Insured" based on the existence of "coverage under another" insurance policy. In the meantime, insurers with such language will often take the position that their coverage does not apply if other insurance is available to cover the loss.

Step 2: Determine the types of "Other Insurance" clauses at issue.

After determining that more than one policy provides coverage for the loss and reviewing the definition of "Who Is An Insured," the next step is to review the "Other Insurance" clauses at issue. There are six basic types of "Other Insurance" clauses. An example of each type follows with the generic language helpful in identifying that type of clause emphasized:

1. *Pro Rata*: If there is any other applicable liability insurance or bond, we will pay *only our share of the damages. Our share is the proportion that our limit of liability bears to the total of all applicable limits.*
2. *Equal Shares*: If all of the other insurance permits *contribution by equal shares*, we will follow this method also. Under this approach each insurer *contributes equal amounts* until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.
3. *Escape*: Coverage is provided for the insured "**but only if no other valid and collectable ... insurance, either primary or excess ... is available** to such person."
4. *Excess*: Any insurance we provide will be excess over any other collectable insurance, self-insurance, or bond. Any insurance we provide for use of a covered auto by any person other than you will be *excess over any other collectable insurance, self-insurance, or bond.*
5. *Excess Over Excess*: Any insurance we provide shall be excess over any other collectable insurance. Any insurance we provide for use of your covered auto by any person other than you or any family member will be *excess over any other collectable insurance, self-insurance or bond stated to be primary, contributing, excess or contingent.*
6. *Super Excess*: Under a "super excess clause," coverage is available only "*after exhaustion of all ... insurance ... whether primary, excess or contingent ...*" Generally, true "super excess" clauses are found only in high level excess policies which also specify the underlying limits which must be exhausted.

Because there is no standard “Other Insurance” language, different language which does not fit within any of the above categories may be encountered. In that event, the language’s effect may vary from any of the categories identified.

Step 3: Determine priority of coverage.

Once the types of “Other Insurance” clauses involved have been identified, the next step is to determine whether they conflict. If there is no conflict, then they should be applied as written. For instance, if one insurer states that it is *pro rata* with other “applicable” insurance and the second policy states that it is “excess” over other “collectable insurance,” then the *pro rata* policy is primary because the excess policy is not “applicable” until primary coverage is exhausted. *Trinity Universal Insurance Co. v. General Accident Fire & Life Insurance Co., Ltd.*, 138 Ohio St. 488, 489 (1941).

If the “Other Insurance” provisions are in conflict, i.e., two policies state that they are excess, then the following general guidelines apply: (1) If two policies both provide coverage on the same basis, they are *pro rata*, i.e., excess vs. excess = *pro rata*. *Buckeye Union Ins. Co. v. State Auto. Mut. Ins. Co.*, 49 Ohio St. 2d 213, syllabus (1977); (2) Where one policy states that it is “excess” and the other policy contains an “escape clause,” the policy with the “escape clause” is primary. *State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co.*, 23 Ohio St. 2d 45, 47-48 (1970); and (3) “Excess over excess” language is read to be “excess” insurance that prorates with other excess insurance. *Progressive Direct Ins. Co. v. Motorists Mut. Ins. Co.*, 191 Ohio App. 3d 686 (1st Dist. 2011). Different or non-standard language requires additional analysis and may vary results.

The priority of coverage analysis should be performed as early as possible to both ensure

prompt notice to the appropriate insurers and to facilitate resolution of the dispute. Using this set-by-step approach will often resolve priority of coverage and point to which insurers should be involved in the defense as well as settlement negotiations. It may also point to the insurer(s) responsible to pay any judgment. In these ways, determining priority of coverage early facilitates the resolution of disputes.



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