Insurance Coverage Update:

Competing "Other Insurance" Clauses -

Not Determinative of the Primary or Excess Layers of Insurance

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Other Insurance clauses are a common feature of insurance policies. However, they do not all contain the same wording. When losses arise, and an insured has several insurance policies potentially responding, the "other insurance" clauses from policy to policy can be in conflict, and essentially "compete" to determine which policy ought to respond first. These exciting competitions infrequently make their way to a court, and so are noteworthy when they do.

In *Northbridge General Insurance Company v. Aviva Insurance Company*, 2021 ONSC 6873, released October 13, 2021, Aviva tried to resist Northbridge's request for contribution towards defence and settlement expenditures of an underlying action. The Court did not accept Aviva's assertion its "other insurance" clause moved its coverage into an excess position over the Northbridge policy. As a result, Northbridge successfully obtained a declaration that Aviva was required to contribute equally to the defence and indemnification.

In the underlying action a pharmacist and his pharmacy were both named defendants. The underlying action arose after an individual took medication dispensed by the pharmacist, became dizzy, fell and broke her hip. After the underlying action settled, Northbridge paid the settlement sum and defence costs. Northbridge then sought to recover against Aviva on the policies respective wordings and principles of equitable contribution.

The Northbridge Policy was a professional services liability policy issued to members of the Ontario Pharmacists Association, of which the pharmacist was a member. It contained an "other insurance" condition that provides it is "excess over other valid and collectible insurance available to the 'insured'".

Meanwhile, Aviva also issued a policy to the pharmacist. That policy was a general liability policy, and excluded claims arising out of professional services. Coverage for professional services was then added into coverage through a "Pharmacy Professional Liability Endorsement".

The parties agreed the only issue to be determined on Northbridge's Application would be:

> *"Whether the "other insurance" clause in the Aviva and Northbridge policies are irreconcilable such that the court should order that Aviva is required to equally contribute to the defence and indemnification of Mr. Daneshvari in the Underlying Action."*

The Court first assessed whether the two policies cover the same risk at the same layer of coverage (i.e. as primary insurers). If so, then principles of equitable contribution would

dictate that both insurers would have "a coordinate liability to make good a loss [and] must share that burden pro rata".

Northbridge's primary professional liability policy had an "other insurance" clause which, on its wording, negated if the insured purchased insurance intended to be excess. The Court found that the insured had purchased no other such excess insurance.

The Court assessed the distinction between a true excess policy and a primary policy, relying upon McKenzie v. Dominion of Canada General Insurance Company, 2007 ONCA 480, 86 O.R. (3d) 419, which in turn cited Trenton Cold Storage Ltd. v. St. Paul Fire and Marine Insurance Co. (2001), 199 D.L.R. (4th) 654 (Ont. C.A.). The conclusion was that relying merely on "other insurance" clauses will not make a policy an excess policy.

Rather, an excess policy's true intent is "to limit the [insurer's] liability to the loss in excess to that which may be collected by the insured under any underlying insurance". The nature of an excess policy is underscored when the policy's terms also impose an obligation upon an insured to maintain underlying insurance, such that the limits of the underlying policies serve to operate (for the excess insurer) as a kind of deductible. The excess policy therefore only comes into play when it covers the same risk as the primary and the primary exhausts, or (in cases when an insured failed to maintain a primary) the liability exceeds the intended primary layer, notwithstanding the absence of such a primary policy.

The Court also commented on an "Umbrella Policy", stating such a policy is "is in effect a hybrid policy that combines aspects of both a primary policy and an excess policy." Umbrella Policies can provide excess coverage to primary policies, but will also provide underlying insurance in instances where the underlying primary does not cover. In that manner, the Umbrella Policy operates as a more complete cover, for any risks that can 'leak through' the primary lawyer.

Aviva's policy was not an excess policy. Its "other insurance clause" did not mean it only applied in a clearly defined risk field sitting above any primary layer. Thus, it was a primary insurance, and the unspecific wording of its "other insurance" clause did not change that.

Once the Court determined that both Aviva and Northbridge policies were primary, it considered whether it could reconcile the other insurance clauses to determine an order of payment. If the clauses could be reconciled, then the clauses would dictate the order of liability of each insurer and there would be no resort to equitable contribution principles. If not reconcilable, the analysis would move to the next stage, discussed below.

Aviva's policy, by endorsement, extended coverage for professional service. However, it argued that for pharmacists with their own liability coverage, the endorsement provides only excess coverage. The "other insurance" clauses are below:

Northbridge Professional Liability Policy	Aviva Property Policy with Prof. Liability Endorsement

This insurance is excess over any other valid and collectible insurance available to the "insured", whether such insurance is stated to be primary, excess, contingent or otherwise. This does not apply to insurance which is purchased by the "insured" to apply in excess of the Policy.	The insurance provided under this endorsement is excess over any other valid and collectible insurance available to individual pharmacists for a loss we cover under this endorsement. (via the professional liability endorsement)

The Court found that the clauses could not be reconciled. The only difference in the other insurance clauses was that the Northbridge coverage was "excess to any insurance available to the insured" while "in the Aviva Policy, coverage is excess to any insurance available to the individual pharmacist." As the Aviva policy was not specific as to what policy it sat excess of, the Court found the "other insurance" clauses in the two policies to be effectively the same.

Aviva therefore was required to contribute equally to the defense and indemnification in the underlying action.

This result may have been different had Aviva's policy carefully stated it was excess to the specific professional liability policy of Northbridge, similar to the scenario arising in *Lawyers' Professional Indemnity Company (LPIC) v. Lloyd's Underwriters*, 2016 ONSC 6196. In addition, the decision does not reference whether the Northbridge policy was a mandatory pharmacists professional liability coverage for all Ontario pharmacists. It the policy had been mandatory, there may have been a basis for Aviva to contend the other insurance wording was contingent upon the Northbridge policy as underlying.

Overall, the case is a good summary of the law on equitable contribution, and the method to juxtapose other insurance clauses, and ultimately should help determine the order of liability for responding policies.