How the 'Other Coverages' Exclusion Can Cost You Millions

by Robert M. Horkovich and Cort T. Malone

Because it is common for a company's insurance program to include several distinct coverage parts, many types of liabilities - including most catastrophic liabilities - may fall under multiple coverages within the same policy. Yet there can be a dramatic difference in the amount of available limits under these various coverage parts. While almost all jurisdictions hold that absent specific policy language to the contrary, the policyholder has the right to choose which coverage part applies, it remains possible that the lesser coverage may trump the greater thanks to insurance companies' manipulation of a policy provision known as the "other coverages exclusion," which stipulates that coverage under any one part of a policy excludes coverage under other parts. A recent decision in DPC Industries, Inc. v. American International Specialty Lines Insurance Co. sets a potentially harmful precedent for policyholders with such an "other coverages" exclusion in their policies.

DPC Industries illustrates the harsh fact that policyholders should not always breathe a sigh of relief when an insurance company initially accepts coverage for a claim. The case involved a chlorine gas leak at a facility in Missouri that ultimately led to over $10 million in defense and indemnity liabilities for the policyholder companies. Although the policy's general liability coverage part (Coverage A) had limits of $11 million, the insurance company (AISLIC) was able to reduce its obligation to $5 million by accepting coverage only under the policy's pollution coverage part (Coverage D) - despite the fact that the claims potentially fell under either coverage part. Under the policy terms, the court held that the insurance company had the right to decide under which part it would accept coverage.

Once AISLIC accepted and paid claims under Coverage D, the court held that the policy's "covered by other coverages" exclusion prevented the policyholders from accessing the additional Coverage A limits - or even the difference between the limits of the two coverage parts. Sometimes referred to as an "anti-stacking" exclusion for multiple coverages, this provision can have disastrous effects for policyholders - especially those facing sudden, catastrophic liabilities and needing an immediate response from their insurance companies. Such situations give the insurance company all the leverage in choosing among potentially applicable coverage parts, and possibly costing policyholders millions of dollars in otherwise available limits.

Now that the Fifth Circuit has upheld this damaging exclusion, policyholders will need to be that much more careful in how they submit claims - and vigilant about how the insurance company agrees to pay them. AISLIC's "other coverages" exclusion to Coverage A stated that the insurance does not apply to:

"Any claim or part thereof which may be alleged as covered under this Coverage of this Policy, if we have accepted coverage or coverage has been held to apply for such claims or part thereof under any other Coverage in this Policy."

Other insurance companies may use different language for their "other coverages" exclusions, but the key is to review your policies (or better yet, have your broker or coverage counsel review them) for any exclusions or provisions that limit application of any coverage part based on acceptance of coverage or payment under another coverage part. Such review is critical both for insurance policies currently in effect and any potential new or renewal policies.

If you are purchasing new coverage or renewing an existing policy, the ideal result would be obtaining a policy with no exclusions for claims covered by other coverages. If, however, an insurance company insists on such an exclusion, the best solution is to include language allowing the policyholder to choose the applicable coverage part where multiple coverages might apply. Such language would protect policyholders from the result in DPC Industries, where the Fifth Circuit found that the policy language permitted AISLIC to decide which coverage to apply to the claims.

If you already have a policy that includes an "other coverages" exclusion, submission of claims to which multiple coverages may apply likely will be a delicate endeavor, particularly if there is a dramatic difference in the available limits under the potentially applicable coverage parts. The first step is to request coverage under the policy part with the higher limits. Ideally, the insurance company will accept coverage under the policy part selected by the policyholder. However, where the insurance company agrees to provide coverage only under the policy part with lower total limits, the policyholder could either bring a declaratory judgment action to determine which coverage part applies, or accept the insurance company's selection pursuant to a reservation of rights, which would permit future litigation regarding the issue of the appropriate coverage part.

A policyholder who has conducted a thorough review of all policies for the presence of such exclusions, and is careful and vigilant about submission and payment of claims, will be better positioned to receive the benefit of the full limits of its policies - and avoid discovering too late that millions of dollars in policy limits were unattainable. ■

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