Policyholder Playbook Episode 37: Additional Insured Coverage May Have To Respond Before Your Own

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Quick Overview of the Play – The best policyholder advocates know that additional insured coverage may respond to cover actual or potential liability before and higher in priority than the policyholder's own coverage. They also know that the analysis often centers on the wording of contractual indemnification provisions.

Consider an accident that implicates multiple parties. Perhaps someone is hurt on a job site and sues the owner of the business, a contractor and a subcontractor. Each defendant may have its own liability insurance and each may be named as an "additional insured" on the other's insurance policies. A question often arises: which insurance policy must respond first?

The law in most states—the "majority rule"—is that "valid contractual indemnification provisions" control the analysis regardless of "other insurance" clauses that may be found in the relevant insurance policies.[1]

For example, if a contractual indemnity provision provides that a vendor must indemnify a buyer and procure insurance in its favor, and an accident arises that implicates the buyer and that indemnification provision, the vendor's insurance arguably must respond before the buyer's insurance regardless of any "other insurance" clauses in the buyer's insurance policy.[2] The reason for the majority rule is two-fold: (1) it gives effect to contractual indemnity provisions, and (2) it avoids the circuitous litigation that would result from prioritizing "other insurance" clauses over contractual indemnity agreements.[3]

A few years ago, we relied on this "majority rule" en route to an important victory for our client where the court held that a contractor's insurance was required to respond first toward a settlement of an underlying bodily injury lawsuit.[4]

Mindfulness of the majority rule is critical, particularly because it can allow an insured who is an additional insured on other insurance policies to preserve its own insurance asset, which it may need in order to respond to future losses.

The upshot? When an accident arises, consider whether you may be covered under another entity's insurance policies, and further consider whether those other insurance policies must respond before your own, thereby allowing you to preserve your own insurance asset.

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[1] M. Paradowski & A. Dunton, *Resolving Commercial Liability "Other Insurance" Disputes*, 17 J. Tex. Ins. L. 12, 16 (2018); *see also Am. Indem. v. Travelers Prop. & Cas. Co.*, 335 F.3d 429, 436

(5th Cir. 2003); *Wal-Mart v. RLI Ins.*, 292 F.3d 583, 588-94 (8th Cir. 2002); *St. Paul Fire & Marine v. Am. Int'l*, 365 F.3d 263, 271 (4th Cir. 2004).

[2] *See Wal-Mart*, 292 F.3d 587 (the indemnity agreement . . . controls the outcome, not the 'other insurance' clauses").

[3] *See id.* at 593–95.

[4] *See Continental Resources, Inc. v. Mid-Continent Casualty Co.*, No. CJ-2018-5184 (Okla. Dist. Ct. Okla. Cnty. Apr. 26, 2019).