



If you have questions or would like further information regarding Primary vs. Excess Insurance Coverage, please contact:

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## ILLINOIS LAW MANUAL

### CHAPTER XI INSURANCE COVERAGE AND DEFENSES

#### J. PRIMARY VS. EXCESS INSURANCE COVERAGE

Insurance policies may apply to a loss on two different levels. Coverage which applies at the first, or primary, level is called “primary” insurance. “Primary” insurance is coverage whereby liability attaches immediately upon the happening of an occurrence that gives rise to liability. Royal Ins. Co. v. Process Design Associates, Inc., 221 Ill. App. 3d 966, 582 N.E.2d 1234 (1991). “Excess” or secondary coverage is coverage whereby liability attaches only after a predetermined amount of primary insurance has been exhausted. Commonwealth Edison Co. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 323 Ill. App. 3d 970 (1<sup>st</sup> Dist. 2001).

“Excess” insurance provides a secondary layer of coverage for the insured as protection from any judgment or settlement that may exceed the limits available under the primary policy. Thus, an “excess” insurance policy is only triggered after the liability limits of the primary policy have been exhausted. This principle is known as “horizontal exhaustion.” Commonwealth Edison Co. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 323 Ill. App. 3d 970 (1<sup>st</sup> Dist. 2001).

Excess insurance can arise in two different ways. First, an insured can purchase an insurance policy which is specifically applied as excess to an existing primary policy. Under this scenario, the purchaser bargains with the insurer for an excess contract which either:

- (i) solely protects the insured against the possibility that a claim will exceed the limits of the primary policy; or
- (ii) contains its own terms definitions, and exclusions and otherwise “follows form” to the primary policy.

Roberts v. Northland Ins. Co., 185 Ill. 2d at 277 (1998). However, when an excess policy specifically names the underlying primary policy and makes no general reference to other policies, that policy is excess only to the named primary policy and does not provide excess coverage to any other primary policy. Federal Ins. Co. v. St. Paul Fire and Marine Ins. Co., 271 Ill. App. 3d 1117, 649 N.E.2d 460 (1995).

Because coverage under an excess policy is not triggered until after all primary policies have been exhausted, the premium paid by the insured for the excess coverage is usually proportionately less expensive than the premium paid for the primary policy. Travelers Indemnity Co. v. American Casualty Co., 337 Ill. App. 3d 435 (1<sup>st</sup> Dist. 2003). The fact that the excess insurer has a decreased risk that its policy will be implicated in a claim and the absence of a duty to defend the insured are also reasons that contribute to the less expensive premium charged for an excess insurance policy. Roberts v. Northland Ins. Co., 185 Ill. 2d at 278.

There is a second scenario in which excess coverage can arise. When an insured has two primary policies which apply to the same loss, Illinois courts generally look to the “other insurance” provisions contained within the applicable policies to

determine which policy applies on a primary basis, and which policy applies on an excess basis. Roberts v. Northland Ins. Co., 185 Ill. 2d at 278. However, where the “other insurance” provisions of the applicable policies are mutually repugnant, Illinois courts will generally require the insurers to share liability on a pro rata basis. Continental Cas. Co. v. New Amsterdam Cas. Co., 28 Ill. App. 2d 489, 171 N.E.2d 406 (1960).

Certain fact situations may arise where the court does not consider the “other insurance” provisions when determining the order of coverage between two primary policies. For instance, where the two primary policies at issue involve a car dealership’s liability policy, and the personal auto liability policy of a permissive driver of the dealership’s vehicle, the Illinois Supreme Court has held that the car dealership’s insurer owes the permissive driver sole primary liability coverage. State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Group, 285 Ill. App. 3d 115 (1996). In State Farm, a motorist was test-driving a car dealership’s vehicle when he was involved in an accident. State Farm defended the driver under the driver’s personal auto liability policy, but brought a subrogation action against the dealer’s insurer, Universal. Id. at 849.

In rejecting Universal’s argument that the driver was not an insured under the Universal policy because he carried his own insurance, the Illinois Supreme Court held that because the law mandating omnibus coverage for permissive drivers under the liability policies applies to policies issued to car dealers, the permissive driver was an insured under the Universal policy. Id. at 850. Further, the Illinois Supreme Court held that regardless of the “other insurance” clauses contained within the two policies, the

dealership's liability policy, and not the driver's policy, was the primary policy responsible for the driver's accident. The court reasoned that to give effect to the Universal policy language would violate Illinois public policy. Id. at 851.

This holding does not apply, however, to a suit against the driver for damages to a car dealer's car. The dealer's insurer does not necessarily have a primary duty to defend or indemnify for such an action. Universal Underwriters Group v. Pierson, 787 N.E.2d 296 (1<sup>st</sup> Dist. 2003).

The "other insurance" clauses also will not be considered in a situation where an insured specifically selects one of multiple insurers providing commercial general liability coverage to provide exclusive coverage to the exclusion of all other insurers. John Burns Construction Co. v. Indiana Ins. Co., (2000), 189 Ill. 2d 570.