Insurance Ruling Clarifies Excess Coverage For Opioid Suits

By **Adam Fleischer** (May 26, 2021, 4:56 PM EDT)

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In a 50-page reconsideration of its Nov. 9, 2020, order, the U.S. District Court for the Western District of Pennsylvania concluded on Tuesday that an opioid policyholder cannot use its payment of defense costs to erode either its own self-insured retention or the limits of its primary insurance.

This ruling in Giant Eagle v. American Guarantee, et al.,[1] reverses an earlier finding that two excess insurers had duties to defend triggered. The ruling provides invaluable assurance to excess carriers that opioid defendants facing millions of dollars in defense costs cannot use those costs as a means to leapfrog their primary coverage and proceed up their insurance towers to reach excess layers.

Underlying Suits

Giant Eagle sought a coverage determination that two of its excess insurers had a duty to defend four opioid suits that were part of the massive federal opioid MDL pending in Cleveland.

Two suits sought claims for medical monitoring on behalf of babies diagnosed at birth with Neonatal Abstinence Syndrome.

Two other suits, filed by Summit County and Cuyahoga County in Ohio, were brought by the government entities seeking abatement damages to combat the opioid crisis that was allegedly caused by defendants' wrongful conduct in distributing and dispensing defendants' opioids. The county lawsuits specified that they do not seek damages for death or physical injury to any individuals.

Coverage at Issue

Old Republic Insurance Co. issued primary fronting policies to Giant Eagle from April 1, 2015, to April 1, 2016, and from April 1, 2016, to April 1, 2017, whereby Giant Eagle's deductible was equal to the policy limits, so Old Republic had no ultimate exposure. The Old Republic primary policies provided $1 million per occurrence limits, which were subject to a $1 million self-insured retention, or SIR.

Pursuant to a SIR endorsement, Old Republic's $1 million coverage obligation would begin once the insured pays loss that exceeds $1 million. The endorsement further provided that, where there is coverage available within the SIR, Old Republic does not have a duty to defend.

The endorsement specified that typical defense expenses, or allocated loss adjustment expenses, that are paid as part of supplementary payments do not count toward eroding the $1 million SIR.

The fact that Giant Eagle's allocated loss adjustment expenses were to be paid in addition to its SIR and in addition to the Old Republic limits was addressed and clarified between the

parties through a program agreement that was incorporated as part of the policy.

In the event that the $1 million SIR in either year became properly exhausted, Old Republic would then pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."

If the Old Republic primary policy in either year is properly exhausted, then in the 2015-2016 year American Guarantee and Liability Co. provided excess umbrella coverage. For the 2016-2017 year, excess coverage above Old Republic was provided by XL Specialty Insurance Co.

Policyholder Arguments, Reconsidered and Rejected

Giant Eagle argued that, because it had expended over $5.7 million defending itself, and because Old Republic's coverage was only a fronting policy, this meant that Giant Eagle had exhausted both years of its primary insurance limits, thereby triggering the excess insurers' duties to defend.

Giant Eagle argued that it need not force Old Republic to make insurance payments as a prerequisite to trigger the excess insurers' duties to defend.

Giant Eagle further argued that its payment of defense costs were not supplementary payments, which would be considered outside the SIR limits, but were instead simply other amounts payable, which must then count as loss payments, that would erode both the amount of the SIR and the Old Republic limits, thereby triggering the duties of the excess insurers.

On Nov. 9, 2020, the trial court ruled that Giant Eagle's payment of its own defense costs properly satisfied its SIRs and also eroded the amount of the primary coverage, thereby triggering both American Guarantee's and XL Specialty's duty to defend.

The court had determined that Giant Eagle's payment of its own defense costs could not be treated as part of Old Republic's supplementary payments because it was Giant Eagle who had paid the money and the term supplementary payments" can only refer to costs paid by Old Republic.

The court found that Giant Eagle's defense payments, if not being considered as supplementary payments, could then only then be viewed as loss payments. Such loss payments, the court found, thereby count toward the exhaustion of both the SIR's and Old Republic's primary coverage — even though the primary insurer had never defended or paid any costs at all.

On a motion for reconsideration, the court noted that it "should be loathe [to reconsider its rulings] in the absence of extraordinary circumstances." However, the court did indeed reconsider its ruling here, and ultimately found that its prior decision to treat the policyholder's defense costs as loss payments was a clear error of law.

The court found that the program agreement, clarifying the coverage between Old Republic and Giant Eagle, was part of the insurance contract and should have been considered in analyzing whether defense costs paid by Giant Eagle do or do not erode the SIR or the Old Republic limits.

When the program agreement was taken into consideration by the court, the court changed

its ruling and determined that the defense costs paid by Giant Eagle do not erode the SIR beneath the Old Republic coverage. Therefore, the Old Republic policy limits themselves have not been eroded, as would be a condition precedent to triggering excess coverage.

Court Discussion of Excess Insurance Principles

The court next addressed the general concept raised by Giant Eagle that nothing in the excess policies themselves required Old Republic to have made payments to exhaust its policy in order for the excess policies to be triggered.

Instead, Giant Eagle argued that the excess policies could essentially be triggered when the amount of the SIR and the amount of the primary limits had been paid — regardless of whether those total amounts were paid by Giant Eagle or by the primary insurer itself.

In rejecting Giant Eagle's position, the court noted the customary and black letter law which holds that true excess or secondary policies are not required to pay until the primary coverage has been exhausted.

In digging deeper into the concept of when primary policies can be deemed exhausted, the court noted a long line of cases from across the country all standing for the proposition that "the excess coverage is not triggered until the underlying insurance is exhausted solely as a result of payment of losses thereunder."

Effect of Ruling

While the pretense for the court's ruling on reconsideration was its failure to take into account the primary policies' program agreement, the reality is that the ruling on reconsideration corrects a series of more fundamental misconceptions of the relationship between fronting insurance and excess insurance.

The erroneous theme running through Giant Eagle's arguments was that its fronting insurance through Old Republic, really should not be treated as insurance at all. In fact, Giant Eagle had not even initially pursued Old Republic for any insurance, instead feigning the position that fronting insurance is simply akin to an extension of the policyholder's own SIR.

Giant Eagle's position, initially adopted by the trial court, is an incorrect representation of fronting insurance. Fronting insurance such as that provided by Old Republic is to be treated as any other arm's length primary policy — notwithstanding that the ultimate dollar exposure gets transferred back to the policyholder.

One reason for this, highlighted by this case, is that excess insurers sign onto a risk expecting the primary layer to handle claims properly, advocate coverage defenses and hold the policyholder to its SIR obligations.

Here, Giant Eagle sought to essentially dissolve the primary insurer's obligations to protect the integrity of the coverage tower. That protection was effectively reinstated by the court's ruling on reconsideration, which not only held the policyholder to its SIR obligations, but which set the stage for the primary insurance obligations to be properly exhausted before the excess layers can be reached.

The importance of the stage set by this decision is best demonstrated through Old Republic's limitation that it only insure damages "because of bodily injury to which this

insurance applies."

Two decisions, Westfield National Insurance Co. v. Quest Pharmaceuticals Inc. and Motorists Mutual Insurance Co. v. Quest Pharmaceuticals Inc., earlier this month from the U.S. District Court for the Western District of Kentucky concluded that when government entities seek only reimbursement for their own expenditures toward the opioid epidemic, then such suits are not truly seeking compensation for bodily injuries as would be required to trigger insurance coverage.[2]

With a primary insurer in place on a coverage tower, the excess insurers on an opioid tower would expect a significant debate over whether the government suits against Giant Eagle, which specifically disclaim any damages for death or injury, can qualify as suits seeking a defense against bodily injury damages.

Had the trial court's ruling here not been reversed, it would have essentially allowed Giant Eagle to entirely bypass this significant and onerous primary coverage question, while driving its defenses costs into a defense obligation of the excess layers.

Conclusion

As opioid policyholders continue to incur millions of dollars in defending the ongoing opioid litigation across the country, it will become increasingly important to determine the extent to which those defense costs erode either self-insured retentions, or any insurance layers.

The reconsidered ruling in Giant Eagle sets the proper industry expectations that, absent specific language to the contrary, defense costs are typically not capable of eroding underlying insurance layers, particularly when such underlying exhaustion is premised on the payment of loss rather than expense.

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Disclosure: BatesCarey acts as coverage counsel for an excess insurer of Giant Eagle, which was not involved in this matter.

[1] Giant Eagle v. American Guarantee, et al., Case No. 2:19-cv-00904 (W.D. PA. May 25, 2021).

[2] Westfield v. Quest Pharma, Case No. 5:19-cv-00083 (W.D. KY. May 6, 2021), Motorists Mut. Ins. Co. v. Quest Pharma., Case No. 5:19-cv-00187 (W.D. KY. May 5, 2021).