



THE NO-LIABILITY CLAUSE

RECOGNIZING THE PROBLEM IS THE FIRST STEP.

William J. Mitchell Ahmuty, Demers & McManus

The “no-liability” clause contained in some insurance policies can come as an unexpected and unpleasant surprise as you plan your risk transfer strategy in any given case. Its function is to treat a person or organization as an insured, or as an additional insured, in the first instance. Once that person or organization has a second policy that applies to the loss, that second policy triggers the no-liability clause, and the first policy drops out.

In other words, one moment you’re an insured, the next moment, you’re not. This

may sound hard to believe, but as one Pennsylvania court put it, “It seems that insurance companies are indefatigable in devising language which excludes coverage rather than accepts it.”

“OTHER INSURANCE” CLAUSES AND THEIR EFFECT

To better understand no-liability clauses, some background on “other insurance” clauses is helpful. “Other insurance” simply refers to a situation in which two or more liability insurance policies cover the

same risk for the same insured. The “other insurance” clause describes how the insurers will share the defense and indemnification when more than one insurance policy is triggered. In a sense, a no-liability clause is an “other insurance” clause, because other available insurance affects payments under the policy.

To interpret “other insurance” clauses, one must look at that clause in each applicable policy. In the simplest sense, *primary* clauses state that they are the first layer of coverage for the insured and pay equally

where there is other insurance available. *Excess* clauses (in an otherwise primary policy) state that they are excess over other available insurance. There are also variations of these, some at the insured's request, such as "super-primary" clauses. By intentionally re-wording its "other insurance" clause, an insurance carrier can manipulate where its policy will stack in the paying order.

Like no-liability clauses, other available insurance triggers "other insurance" clauses. Most people in the world of risk management and risk transfer have a good working understanding of the way that "other insurance" clauses work vis-à-vis each other. Where two policies are triggered, both of which have primary clauses, the result will be concurrent, equal sharing. Where one policy has a primary clause, and another policy has an excess clause, the excess clause will typically be given effect, and that particular policy will not be triggered until after the limits of the primary policy are exhausted. Where two or more policies all have excess "other insurance" clauses that contain substantially similar language and cannot be reconciled, the courts will typically find the policies "mutually repugnant," and find that all policies will share equally beginning at dollar one.

It has become increasingly common to find situations in which two applicable policies both have excess clauses. For example, a contractor retains a subcontractor, and requires the subcontractor to obtain insurance for the contractor. The contractor may have a primary policy that contains "other insurance" language to the effect that the contractor's policy becomes excess where the contractor has been listed as an additional insured on another's policy. In other words, risk of loss is contractually passed to any subcontractor. At the same time, the subcontractor hired by the contractor may have added the contractor as an additional insured, but the subcontractor's policy has an excess provision within the additional insured endorsement. Typically, the excess clauses would then cancel each other out, and neither policy would be deemed excess over the other. Thus, the two policies would apply concurrently and share equally on a primary basis. This result could leave one or both of the parties, and their insurance carriers, frustrated because this result was not their intent.

EXAMPLES OF NO-LIABILITY CLAUSES

Enter the no-liability clause: the next step in the insurance carrier's efforts to move its policy away from the risk. The effect of the no-liability clause is to only pro-

vide coverage for people or entities, but only if they have no other coverage at all. For the contractor, recognizing no-liability clauses in its subcontractors' policies can prevent problems going forward. For the claims professional, recognizing that one of the potentially paying policies has a no-liability clause will allow the claims adjuster to avoid litigation surprises, reevaluate the risk transfer target, adjust reserves, and help to reach an objective settlement.

So what do no-liability clauses look like? Unlike "other insurance" clauses, which are often labeled in the policy, no-liability clauses may not be clearly marked. In addition, no-liability clauses could appear in virtually any type of policy.

No-liability clauses could read something like this:

- "The insurance contained in this policy is not applicable to any person with respect to any loss against which he has other valid and collectible insurance."
- "None of the following is an insured... any person other than the named insured, if such person has available to him any other valid and collectible automobile liability insurance."
- "Who Is An Insured includes you for any covered loss, and anyone else, except your customers, unless they have no other available insurance."
- "If there is other valid and collectible insurance, whether primary, excess or contingent, available to the garage customer and the limits of such insurance are sufficient to pay damages up to the amount of the applicable financial responsibility limit, no damages are collectible under this policy."
- "This insurance does not apply to any injury or damage to the extent that the insured has available any other valid and collectible insurance, whether on a primary, excess or contingent basis."
- "With respect to your mobile equipment, the term 'insured' also includes your employee and any other person legally liable for the conduct of such person, but only if there is no other insurance covering the liability available to them."

These no-liability clauses (also called "escape clauses") often can be a confusing read, but always favor the insurance carrier. As noted above, the net effect is that coverage is provided under a policy with a no-li-

ability clause, unless or until you have other available insurance, at which point, you are no longer an insured on the policy containing the no-liability clause.

JUDICIAL TREATMENT OF NO-LIABILITY CLAUSES

How do the courts treat no-liability clauses? Despite some personal distain, many courts have given no-liability clauses the meaning that the insurance carrier intended. After all, parties are free to contract as they wish, and if the no-liability clause is at issue, it means that the insured already has other insurance available. In other jurisdictions, courts have rejected no-liability clauses as repugnant – after quoting a no-liability clause, an appeals judge in Florida once wrote: "Did the Queen of Hearts write this for Alice?" Still other jurisdictions have applied some other allocation, oftentimes depending upon the specific wording of the no-liability clauses when compared to the other policies. As with most legal matters, this underscores the importance of knowing the rules in your particular jurisdiction.

Thus, in jurisdictions that will apply no-liability clauses, where a properly-written no-liability clause squares off against a policy with a standard primary "other insurance" clause, the no-liability clause wins. Against an excess clause, the no-liability clause will often be given effect, trumping the excess clause, but not always. Two policies that both contain escape clauses are often reduced to primary, concurrent policies.

As with any potential problem, awareness of the issue is the first step. No-liability clauses can arise in a variety of policies, and there is no telling where these will show up in the future. Watch particularly in matters that involve a mix of policies, such as instances where both automobile and general liability policies are triggered, as these clauses are common in commercial automobile policies, but less common in the general liability context. By recognizing no-liability clauses, you are better prepared to deal with them.



William J. Mitchell is an attorney with Ahmuty, Demers & McManus in New York, where he is co-chair of the firm's Insurance Coverage Group. His practice focuses on insurance coverage litigation, for both policy holders and insurers, and he may be reached at william.mitchell@admlaw.com.