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# The Ultimate Finger-Pointing Game: Other Insurance Provisions and How They Intersect With Self-Insured Programs

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Insurers like to make their coverage obligations someone else's problem. One of the ways they do this is by saying that another insurer has to go first. In other words, insurers will sometimes take the position that another insurer has to pay its full policy limit before the first insurer pays anything. The insurers play this finger-pointing game by citing the "other insurance" provision, which is standard in most liability insurance policies. In certain circumstances, courts will "cancel out" dueling "other insurance" clauses and require each insurer to pay on a 50-50 basis when coverage truly overlaps. Other times, courts will establish a "proportional" split of responsibility if one insurer provided higher limits than the other insurer when multiple policies are triggered. As always, the precise words of the insurance policy will directly impact a court's analysis of the disputed coverage provisions. Recently, the New Jersey Supreme Court tackled another "other insurance" dispute that does not often garner much attention but may be important for corporate policyholders to consider, especially if those policyholders "self-insure" a significant part of their insurance program.

In *Statewide Insurance Fund v. Star Insurance Company,* a young boy sadly died on the beach in Long Branch. His family sued the town, and they settled the case. Long Branch was part of a "joint insurance fund," or "JIF," administered by Statewide, which was an organization of towns in New Jersey that pooled their resources and insurance risk exposures in one fund up to a certain threshold, $10 million. Long Branch also had a separate policy of insurance issued by Star that provided a $10 million limit. When Long Branch settled the claim with the family, Star refused to contribute, taking the position that it was "excess" coverage and Star was on the hook only after "other insurance," i.e., the Statewide funding, was exhausted. Statewide filed a declaratory judgment action seeking to establish that its coverage was excess to any coverage provided under the Star policy.

Sorting through the finger-pointing, the New Jersey Supreme Court determined that Star was solely responsible for the settlement of the claim. The Court took the commonsense approach that so-called "self-insurance" is not really "insurance" at all when considering the "other insurance" provision contained in the Star policy. That is because in a self-insuring pool such as the JIF, "members retain significant risk by paying claims from member assessments,"[1] and the Court readily acknowledged that such risk pooling stands in stark contrast to typical insurance, where an insurer takes on risk in exchange for the payment of a premium. Accordingly, the Court held that the money Long Branch could get from the JIF was not "other insurance" and that Star had to honor its promise to serve as the primary insurer and was first in line to pay the claim.

The Court's opinion makes clear that if an insured is responsible for its own loss, it is not to be considered "insured" at all and, therefore, should not lose the benefit of actually valid and collectible insurance available elsewhere. While insurers likely will want to declare this decision is an "outlier" or limited to the "unique" facts of a risk pooling program, the holding of *Statewide* has far broader implications because it draws a clear distinction between "self" insurance and "real" insurance.

Many corporate policyholders utilize "self" insurance to serve as primary coverage through captive insurance programs or by carrying large self-insured retentions and then having "real" excess coverage. In fact patterns where that same policyholder has additional insured rights under another party's insurance policy–for example, in the context of a

[1] *Statewide Ins. Fund v. Star Ins. Co.*, -- N.J. -- (Feb. 16, 2023) (slip op. at 16) (emphasis deleted).

construction defect claim where an owner may have its own insurance coverage and have rights under insurance policies held by general contractors (GCs) or subcontractors–the "other insurance" clause may rear its head again. Insurers for the GC and/or the subs may try to draw the owner into paying for some or all of a claim by invoking their "other insurance" provisions. Relying on Statewide, owners now have an additional arrow in their quiver to push back against that contribution demand. Rather, owners would have the ability to take the position that they have no "other insurance" available because they are self-insured and the GC and subcontractor insurers are first in line to pay.

At bottom, corporate policyholders that utilize captive or fronting insurance, carry large self-insured retentions, or employ other bespoke risk transfer mechanisms need to take a careful look the next time they are told by an insurer that it wants to head to the back of the payment line based on an "other insurance" clause. As the *Statewide* decision demonstrates, the nuances associated with insurance programs and coverage disputes are complex but also important. Any policyholder that receives a denial of coverage based on an "other insurance" clause will be well served to review that disclaimer with experienced coverage counsel before agreeing to accept responsibility for any payment obligation.

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