

Insurer Barred From Enforcing Policy's Declining Limits Provision Due to Incomplete Discovery Disclosure in Defense of Tort Claim

The U.S. District Court for the Southern District of Illinois recently held an insurer responsible for payment of its original liability limits, disregarding policy language clearly requiring reduction of limits through payment of defense expenses. The court held that the insurer was estopped from enforcing the policy's "declining limits" provision because defense counsel retained by the insurer provided what the court believed was an inaccurate identification of policy limits during discovery in the underlying tort case, and other parties relied on that representation. *Nat'l Fire and Marine Ins. Co. v. Lindemann*, 2018 WL 4986878 (S.D. Ill. Oct. 15, 2018).

National filed an action seeking a declaration that a liability insurance policy it issued to two defendants in an underlying wrongful death suit was a "declining limits" policy and that the policy's original limits were reduced by payment of defense costs. St. Elizabeth's Hospital, one of the defendants in the underlying case, opposed National's declaratory claim, contending that National should be estopped from imposing its declining limits (or "declining balance") provision. St. Elizabeth's argued that National had asserted in the underlying case, through defense counsel retained for the insured, that the applicable policy limits were \$1 million. The discovery response did not make clear that the \$1 million limit would decline as defense expenses were incurred.

National argued that it was not a party to the underlying action and should not be bound to the discovery responses drafted by the insured's defense counsel. Nevertheless, the court found that National, through its agent (defense counsel), misrepresented its limits of liability by virtue of an interrogatory answer stating the limit was \$1 million. The other parties to the underlying case did not discover the declining limits aspect of the policy until defense counsel produced the actual policy two years later. The *Lindemann* court further stated that St. Elizabeth's was detrimentally harmed by the misrepresentation and may have changed its litigation strategy if it was aware of the declining limits provision, so an estoppel finding was warranted.

The *Lindemann* court relied on a similar 2016 Illinois Appellate Court decision in which the court precluded an insurer from relying on an endorsement to a general contractor's liability policy that would have reduced the policy limits. *Harwell v. Fireman's Fund Ins. Co. of Ohio*, 2016 IL App (1st) 152036. In *Harwell*, the insurer's appointed defense counsel provided written discovery responses in an underlying case stating that the maximum liability limit of the policy was \$1 million. The insurer later notified the contractor that the policy's liability limits were actually \$50,000 and the reduced limits were inclusive of defense costs. But the defense counsel did not revise the discovery response or

communicate with the plaintiff's counsel regarding the correct limits amount. The Illinois Appellate Court accused the insurer of "sandbagging" the plaintiff's counsel and therefore barred the insurer from imposing the \$50,000 limit. The *Lindemann* court extended the *Harwell* opinion to apply to cases dealing with eroding policy limits.

Comment

In light of *Lindemann* and *Harwell*, insurers should take appropriate steps to ensure that appointed defense counsel for insureds correctly describe and identify applicable policy limits, including any policy provisions regarding reduction or erosion of limits, during the course of underlying litigation. The potential risk

resulting from inaccurate or incomplete disclosures in the underlying case – i.e. the insurer's subsequent inability to enforce policy terms relating to limits – certainly warrants close monitoring of such disclosures.

If you have any questions about this Update, please contact the author listed below or the Aronberg Goldgehn attorney with whom you normally consult:

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