

## Hotel's Excess Insurer Escapes Liability as "Following-Form" Coverage Excludes Claim

Many policyholders assume that "following form" excess liability coverage will be available, if needed, above the primary policy's limits. This assumption should never replace the true measure of determining coverage—reading the policy. As the Eleventh Circuit recently held in Starstone National Insurance Co. v. Polynesian Inn, LLC, 2020 WL 3121299 (11th Cir. June 12, 2020, unpub.), certain conditions built into the excess policy may bar excess coverage altogether.

In 2017, two guests at a Florida hotel were viciously attacked by a knife-wielding suspect resulting in one death and serious injuries to the other victim. In response to the tort claims, the hotel turned to its primary GL coverage issued by Northfield Insurance Company with limits of \$1 million per occurrence and excess following form coverage provided by Starstone National Insurance Company (previously Torus National Insurance Company) with limits of \$3 million per occurrence.

The Northfield primary policy contained a "Limited Assault or Battery Liability Coverage" endorsement which, among other things, created coverage for "bodily injury" caused by an assault or battery offense subject to a \$25,000 limit for each offense. The Starstone excess policy was a "following form" policy intended to follow the "definitions, terms, conditions, limitations and exclusions" of the underlying Northfield policy. Starstone denied coverage for the assault/battery claim based on an exclusion in its excess policy and commenced a declaratory judgment action against its insured seeking a declaration of no coverage owed because the underlying policy was subject to a "sublimit" of liability for assault or battery offenses.

Starstone's excess policy contained two provisions which, in the court's view, allowed it to avoid coverage for this claim. First, Starstone agreed to pay sums in excess of the underlying policy's "Total Limits" that the insured becomes legally obligated to pay as damages. "Total Limits" was defined, in relevant part, as \$1 million per occurrence. Second, and most importantly, the excess policy excluded coverage

*"with respect to or as a result of any of the following clauses or similar clauses in the Followed Policy: ...3. Sublimit of liability, unless coverage for such sublimit is specifically endorsed to the Policy." (emphasis added)*

Based on the above provisions, Starstone maintained it owed no excess coverage because the Northfield policy's assault or battery endorsement constituted a "sublimit of liability" triggering the excess policy's exclusion. The Eleventh Circuit agreed. Adopting the ordinary definition of "sublimit," the court held that the term is generally defined as a "limit on a subcategory" for a particular risk which is "part of, rather than in addition to the limit that would otherwise apply to the loss." Applying that definition, the court held that the Northfield policy's assault or battery endorsement qualifies as a sublimit because it caps Northfield's exposure for a subcategory of loss at an amount below the normal policy limit. Accordingly, the hotel was left with \$25,000 from the primary policy and nothing from its excess cover-

age for this significant claim.

There are two key takeaways from this decision to avoid a similar forfeiture of excess coverage. First, ensure that the excess policy's limits apply in excess of all of the underlying policy's limits, including sublimits. Second, review the excess policy carefully despite representations that it is a "following form" policy to make sure it does not contain a specific exclusion as a result of any sublimit of liability or similar clause. Following these steps will help avoid a denial of excess coverage when you need it most.

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