



What Qualifies as an Excess Policy in the State of Oregon?

From the Desk of Ryan McLellan: Oregon law imposes certain minimal financial responsibility laws on providers of motor vehicle liability insurance. However, there are several types of insurance that are statutorily exempted from those minimum requirements. One exempted type of policy is an excess liability policy. How does an Oregon court determine whether a policy is properly classified as an excess policy? Read on to find out.

Claims Pointer: In this dispute between insurers, the Oregon Court of Appeals was required to identify the characteristics that make a liability policy an excess policy under Oregon law. In its opinion, the court of appeals rejects a test established by an Oregon federal district court and determines instead that it must look to the text and intention of the contracting parties to determine whether a liability policy is an excess policy. After establishing the correct test, the court determined that the defendant in this matter had indeed issued an excess liability policy and was accordingly not subject to Oregon's minimum financial responsibility laws.

[Oregon Mutual Ins. Co. v. Certain Underwriters, 295 Or App 790 \(Jan. 30, 2019\).](#)

This case arose from of a dispute between two insurers who provided coverage for the same injury. RSVP-SCP of Clackamas County (RSVP) is an Oregon non-profit that arranges for volunteers to transport individuals to medical appointments. Schabert, a volunteer registered with RSVP, was tasked to pick up and transport Saint to a medical appointment. When Saint was entering Schabert's vehicle, she slipped, fell, and suffered personal injuries. Saint settled with Schabert for \$180,000. The first \$100,000 of the settlement was paid by Oregon Mutual, Schabert's primary automobile insurance policy. Lloyd's of London, which provided a "volunteer excess auto liability" insurance policy for RSVP, paid the remaining \$80,000 of the settlement.

After Schabert settled with Saint, Oregon Mutual brought a contribution action against Lloyd's, arguing that Lloyd's was a co-insurer responsible for paying a pro-rata share of the settlement amount under Oregon's *Lamb-Weston* doctrine. Lloyd's responded that the policy it provided to RSVP was an excess policy that was not subject to the *Lamb-Weston* doctrine and, accordingly, it was not required to pay a pro-rata share of the settlement. Lloyd's filed a motion for summary judgment arguing the same, which was granted by the trial court.

Oregon Mutual appealed the trial court's grant of summary judgment, arguing that the court had erred in failing to classify the insurance policy issued by Lloyd's to RSVP as an excess policy. It argued that the trial court failed to apply a three-pronged test to determine whether a liability policy is a "true" excess policy. To meet Oregon Mutual's proposed test, a liability policy must: (1) be written with the underlying primary policy in mind and acknowledge the underlying policy; (2) require maintenance of the underlying policy and identify its specific limits; and (3) be purchased and maintained by the same insured that holds the underlying primary policy. Oregon Mutual argued on appeal that the trial court erred by failing to apply this test to determine that Lloyd's policy was *not* an excess policy.



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Oregon Case Update



The relevant provisions in the policy issued to Lloyd's are reproduced to illustrate the facts the court relied upon in making its decision. First, Lloyd's volunteer excess liability policy, issued to RSVP, provided that "[Lloyd's] will pay all sums in excess of the 'retained limit' that the insured becomes legally obligated to pay as damages because of 'Bodily injury', 'property damage' or 'personal injury' to which this insurance applies." The policy continued to define the "retained limit" as "the greater of: 1. [a]n amount equal to the applicable limits of insurance of any other insurance collectible by the insured; or 2. [a]n amount equal to the minimum limit of insurance required under the motor vehicle financial responsibility law of the state or province in which the 'accident' occurs or \$50,000 or whichever is less." Finally, the policy excluded "[a]ny obligation under any uninsured or underinsured motorists law, 'no-fault' law, basic reparations benefit law, and any law requiring personal injury protection coverage, or any similar law."

The court of appeals began its review by rejecting Oregon Mutual's proposed three-prong test. Oregon Mutual had derived the test from a nonbinding, unpublished opinion from an Oregon federal district court. That federal opinion had predicted that the Oregon Supreme Court would rely on a previous Oregon Supreme Court opinion, *Maine Bonding*, to determine what the legislature would have understood is required for an excess liability policy. The court, however, determined that the federal court's reliance on *Maine Bonding* was misplaced. Accordingly, the federal court's prediction that the Oregon Supreme Court would adopt the aforementioned three-prong test to determine whether a policy is a "true" excess policy was similarly misplaced. For that reason, the court was required to undertake its own statutory interpretation to determine the requirements for a liability policy to be an "excess" policy.

Relying on both plain meaning and case law, the court found that an excess policy, as commonly understood, "is one that provides a specific amount of coverage above an underlying limit of primary insurance, but does not expand the scope of that coverage..." Accordingly, the defining feature of a "true" excess policy "is to provide coverage to an insured that can only ever 'kick in' above the limits of primary coverage."

Taking that understanding and applying it to the action between Oregon Mutual and Lloyd's, the court determined that the coverage in Lloyd's volunteer excess auto liability policy only paid sums in excess of the retained limit. Accordingly, the policy provided no primary coverage and only kicked in when the primary coverage was exhausted. For those reasons, the policy provided by Lloyd's was a "true" excess policy that was not subject to the *Lamb-Weston* doctrine.

View full opinion at: <https://cdm17027.contentdm.oclc.org/digital/pdf.js/web/viewer.html?file=/digital/api/collection/p17027coll5/id/22040/download#page=1&zoom=auto>



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