

## Tennessee Appellate Court Declines To Find “Other Insurance” Clauses Mutually Repugnant

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A Tennessee appellate court ruled that an “other insurance” clause in a policy rendered its coverage primary to another insurer’s coverage, declining to adopt an approach under which both clauses are deemed irreconcilable so as to require pro rata allocation. *Sentry Select Ins. Co. v. Tennessee Farmer’s Mut. Ins. Co.*, 2021 WL 4352537 (Tenn. Ct. App. Sept. 24, 2021).

A farm owner purchased insurance from Sentry to cover damage to certain equipment. That policy included an “other insurance” clause containing two subsections. The first section stated that if the policyholder had insurance subject to the “same plan, terms, conditions and provisions” as the Sentry policy, Sentry would pay a proportionate share of coverage. The second section stated that if the policyholder had insurance “other than that described” in the first section, Sentry would pay only the amount in excess of that due from the other insurer.

Two years after obtaining the Sentry policy, the farm owner added the equipment to an existing Farmer’s Mutual policy. The “other insurance” clause in that policy stated that its coverage “is excess over any other insurance” unless “other insurance is specifically written as excess over the insurance provided in this endorsement.”

When a fire destroyed the insured equipment, the policyholder sought coverage under both policies. Both insurers argued that their coverage was excess to the other policy. A trial court ruled that the two-year gap between the purchase of the Sentry policy and purchase of coverage under the Farmer’s Mutual policy demonstrated that the Sentry policy was intended to be primary and the Farmer’s Mutual policy was intended to be excess. The appellate court affirmed on different grounds.

The appellate court held that the order in which the policies were obtained is immaterial to interpretation of “other insurance” clauses, so long as both policies were in effect at the time of injury or loss. Further, the court held that “other insurance” clauses are not necessarily repugnant where, as here, each includes different language that could be reconciled. The court explained that Farmer’s Mutual policy would be deemed primary only if the Sentry policy was “specifically written as excess,” which was not the case. The court emphasized that language in subsection one of the Sentry policy, requiring it to pay a pro rata share when another policy contains the same terms and conditions, indicates its intent to be primary. The court noted that even under the second subsection, which applied when another policy contained different terms and conditions, Sentry would still be primary because that provision stated that Sentry would pay the amount “in excess of the other amount

due from that other insurance.” The court explained that because the Farmer’s Mutual policy was written strictly as excess, there was no “amount due” from that policy.

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