

Escape Clause Coverage Update

November 1, 2023

Escape Clause – Ohio

Acuity, A Mut. Ins. Co. v. Progressive Specialty Ins. Co.

--- N.E.3d ---, 2023-Ohio-3780, 2022 WL 20814977 (Ohio Oct. 19, 2023)

The Ohio Supreme Court reversed an appeals' court ruling that two auto policies issued to a driver of a vehicle and to the vehicle's owner should share coverage for an accident that caused bodily injury and damage to city property. Reinstating the finding of the trial court, the Supreme Court found that only one of the policies was required to provide coverage.

In June 2020, Ashton Smith (Smith) borrowed his friend's vehicle and was involved in an accident in which he struck a city-owned pole. The passengers in the vehicle alleged that they sustained bodily injuries in the accident. Smith was insured as a named driver under his father's auto policy issued by Acuity, a Mutual Insurance Company (Acuity), and the owner of the vehicle was insured by Progressive Specialty Insurance Company (Progressive). Acuity commenced a declaratory judgment action, alleging that Progressive was required to provide primary coverage and that Acuity's policy was excess over the Progressive policy. Both insurers filed dispositive motions in the trial court.

The trial court ruled in favor of Progressive, holding that Smith did not fall within the definition of an "insured person" under the Progressive policy and that there was no other liability insurance available to Smith over which the Acuity policy could be considered excess. Acuity appealed the decision, and the Eleventh District Court of Appeals for Ohio reversed the trial court's ruling. The appellate court found that the Progressive policy's definition of "insured person" was considered an escape clause that had been held to be unenforceable in *State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co.*, 23 Ohio St.2d 45, 261 N.E.2d 128 (1970). Because it was unenforceable, both the Progressive policy and the Acuity policy were required to cover Smith's liability arising from the accident.

The Supreme Court accepted Progressive's appeal and reversed the appellate court's decision. The Supreme Court found that under the plain language of the Progressive policy, Smith would not be considered an "insured person" because although he was a permissive user of the owner's vehicle, such a permissive user would only be an "insured person" if he did not have liability coverage under any other policy. Because Smith was insured under the Acuity policy, he could not be considered an "insured person" under the Progressive policy.

The Supreme Court further found that the *State Farm* case relied upon by the appellate court was distinguishable: "underpinning the court's holding in *State Farm* was the concern that if the court gave 'full effect' to both policies, 'neither policy would cover the loss.'" The respective language of the

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Progressive and Acuity policies, however, did not give rise to a similar situation. Therefore, the Supreme Court rejected the appellate court's holding that relied upon the *State Farm* case, and further declined to adopt a broad rule, as requested by Acuity, that escape clauses like the one at issue are unenforceable. Instead, the Supreme Court found that insurers are entitled to limit coverage through their policies' definitions of "insured person," concluding that "where two insurance policies potentially cover the same loss and a plain reading of the language of both policies establishes that one of the policies provides coverage, we will give effect to that plain language."