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Attorney-Client Privilege and Work-Product Protection

VIA E-MAIL

Gina Dean
CSAC Excess Insurance Authority
Chief Operating Officer
75 Iron Point Circle, Suite 200
Folsom, CA 95630

RE: MOC as "Other Insurance"/AI Issues
Member: County of Sonoma

Dear Ms. Dean:

You have requested our brief opinion regarding the need for the County of Sonoma ("County") to continue to incur costs overseeing its status as a "primary and non-contributory" additional insured ("AI") under its vendor and service agreements with third parties. One of the County emails you provided for review states that significant County staff time is consumed in "obtaining copies of the correct part of the policy to verify coverage." Thus, we are presently unclear whether the County wishes only to cease verifying and enforcing "primary and non-contributory" AI status or whether the County would like to wholly discontinue verifying that third parties provide the County with AI endorsements per the County's contractual requirements. To avoid confusion, we address both questions.

First, as the County correctly notes, the CSAC-EIA is a public joint risk pool and not "insurance". *(See* Cal Gov Code § 990.8.) A 1997 California appellate decision found that a commercial insurance policy's "other insurance" clause cannot apply to excess coverage available under a public joint risk pool arrangement because the latter coverage is "not insurance". *(See Orange County Water Dist. v. Ass'n of Cal. Water Etc. Auth.,* 54 Cal. App. 4th 772, 774 (Cal. App. 4th Dist. 1997).) In a subsequent case, *Schools Excess Liability Fund v. Westchester Fire Ins. Co.,* 117 Cal. App. 4th 1275 (Cal. App. 2d Dist. 2004), another California appellate court expanded *Orange County* by ruling that a commercial insurer's "other insurance" clause cannot apply to coverage available under a public joint risk pool, even where that pool's coverage was granted to a non-member, private transportation company.

Both of those cases remain controlling law in California. However, neither case has received much, if any, subsequent treatment by courts, and this body of law is relatively undeveloped as a whole. On balance, we believe the above-cited cases will likely allow CSAC-EIA members to defeat commercial insurers' claims that the CSAC-EIA's Memorandum of Coverage ("MOC") constitutes "other insurance" for purposes of coverage priority determinations. Future developments in this area of law may impact this result, however, and the cited cases certainly cannot foreclose the potential that an insurer may successfully distinguish its own coverage dispute.

Insofar as the County wants to reduce operational costs by ceasing to enforce its "primary and non-contributory" AI status requirements, it should be able to do so in light of the fact that the MOC is not considered "insurance" for purposes of determining the priority of available coverage. The MOC, by its express terms, is to be excess to any commercially available coverage. In our opinion, the AI coverage available to the County under the currently-utilized national insurance forms would not be materially affected by the County's failure to specifically secure "primary and non-contributory" AI status, assuming the County nonetheless verifies that an AI endorsement has been issued in the first place.

The ISO-based liability policy forms typically used in commercial general liability policies currently do not have language expressly contemplating contribution from public risk pools. In the event that the form language changes to seek such contribution, the need to have "primary and non-contributory" AI endorsements may arise, regardless of the fact that the CSAC-EIA is not "insurance". With that said, best practices may ultimately dictate continuing to verify that the County receives "primary and non-contributory" AI status.

The County's query can also be read to suggest the County has contemplated discontinuing its verification of AI endorsements altogether. If the County wishes to stop verifying and enforcing its contracts' AI requirements in whole, in order to avoid the high costs associated with "obtaining copies of the correct part of the policy to verify coverage" as stated in the County's email, the County may end up without any AI coverage at all. If the County were to cease its verification processes altogether, it is likely that third party vendors, contractors, and licensees would frequently fail to secure effective AI endorsements for the County's benefit, and that the County's defense and indemnity tenders will thereafter be rejected by the vendor's commercial insurers. Short of litigation against the third party under the contract terms, the County will ultimately lose the benefits of its bargained-for commercial coverage, which would most likely otherwise provide first dollar defense and indemnity. We believe the coverage losses associated with that potentially recurring problem could be greater than the County's net savings in wholly ceasing its AI verification processes (if that is what the County plans).

Under the cited case law and the commonly utilized commercial insurance forms that do not contemplate contribution from public risk pools, the County could likely discontinue verifying whether the AI endorsements contain "primary and non-contributory" language. We question whether significantly increased efforts are required to verify "primary and non-contributory" status over verifying AI status generally (which we think the County should continue to do). If there is no material difference, we believe the County should continue its current practice of verifying that effective AI endorsements are obtained in its favor.

If you have any questions, do not hesitate to contact me directly.

Very truly yours,

FARMER SMITH & LANE, LLP

David R. Lane

Please note: The conclusions and recommendations in this letter reflect the studied opinion of Farmer Smith & Lane LLP as to what a court should conclude upon consideration of the coverage issues discussed and are not a guarantee of such conclusions. The conclusions and recommendations are necessarily based on the information provided to us and on current law and are subject to the uncertainties of litigation and changes in relevant legislation and decisional law.

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