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D&O Policy Other Insurance Provision Enforced as Excess Over CGL Policy

Insurance Law Update

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By: Gilbert Lee

New York Court of Appeals

In *Fieldston Property Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc.,* ___ N.E.2d ___, 2011 WL 649812 (N.Y. February 24, 2011), the New York Court of Appeals concluded that under separate policies affording commercial general liability (CGL) and directors and officers (D&O) insurance coverage to the insurers' mutual insured, the primacy of the CGL policy over the D&O policy was established by the policies' other insurance.

The insured was sued in two successive actions alleging false statements and fraudulent claims purportedly made before community groups and elected officials concerning land use, and the insured sought coverage under both its CGL and D&O policies. According to their respective "other insurance" provisions, the CGL policy was to be primary except as to certain (inapplicable) types of insurance, whereas the D&O policy was to be excess over any other valid policy "whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise." Relying on the "other insurance" provisions, the D&O insurer disclaimed coverage for the underlying actions, asserting that its coverage for defense costs was excess over the CGL policy. The CGL insurer defended the insured in both actions subject to a reservation of rights, including its right to recover defense costs from the D&O insurer. In the resulting coverage litigation commenced by the CGL insurer against the D&O insurer seeking reimbursement for defense costs, the trial court denied each insurer's summary judgment motion for failure to demonstrate their respective positions as a matter of law. On appeal, the Appellate Division reversed and entered summary judgment in favor of the CGL insurer on the grounds that the "other insurance" clause in the D&O policy was inapplicable as to causes of action not insured under the CGL policy but insured under the D&O policy.

The Court of Appeals reversed the Appellate Division and reinstated the trial court's original decision. Under New York law, if any claim in a lawsuit against the insured is potentially covered, the insurer must defend the action in its entirety, regardless of whether additional claims that fall outside of coverage are also alleged. Here, although the majority of the causes of action asserted in the underlying actions arguably were not covered under the CGL policy (and potentially covered under the D&O policy), the claim for injurious falsehood could conceivably be covered. Therefore, a primary duty to defend was triggered under the CGL policy. The court recognized that the outcome would have been different had the policies other insurance provisions been drafted differently, but it would not rewrite the policies to achieve a more equitable result.

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