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NEWSLETTER

Other Insurance Provision in D&O Policy Did Not Excuse Insurer from Its Duty to Defend Suits

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The New York Supreme Court, Appellate Division, has held that an "other insurance" provision in a directors and officers liability policy issued to a homeowners association did not excuse the insurer from defending the insureds where the underlying lawsuits also triggered another insurer's duty to defend under the association's commercial general liability policy. *Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co.*, 873 N.Y.S.2d 607 (2009). The court therefore ordered the D&O insurer to reimburse the CGL insurer for its equitable share of defense costs.

The insureds sought coverage for two lawsuits, and both the D&O insurer and the CGL insurer acknowledged that the lawsuits triggered the duty to defend the directors and officers of the association under their respective policies. The D&O insurer, however, argued that its policy was in excess of the CGL policy because of the other insurance provision in the D&O policy, which provided that: "If any Loss arising from any claim made against the Insured(s) is insured under any other valid policies prior or current, then [t]his policy shall cover such Loss . . . only to the extent that the amount of such Loss is in excess of the amount of such other insurance whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over the limits provided in th[is] policy." The CGL insurer defended the insureds under a reservation of rights. After the underlying suits were resolved, the CGL insurer brought a declaratory judgment action against the D&O insurer, seeking reimbursement for defense costs.

The court held that the other insurance provision in the D&O policy "applies only where a loss is insured under both the D&O policy and another 'valid policy.'" The court observed that only one cause of action asserted in both suits, for injurious falsehood, potentially fell within the coverage of the CGL policy, while the D&O insurer had conceded that at least several other causes of action fell within the potential coverage of the D&O policy. Thus, except for the injurious falsehood claims, the court reasoned that the D&O policy could not be excess of the CGL policy because the policies did not insure against the same risks. The court noted that the D&O insurer's interpretation of the other insurance provision lacked support and would create a disincentive for co-insurers to accept their duty to defend policyholders where it appeared that another insurer's duty to defend

was triggered. The court further observed that the D&O policy was issued before the CGL policy and, as a result, the premium charged by the D&O insurer presumably reflected its broad assumption of the duty to defend without any assurance that the policyholder would secure additional, overlapping coverage.

In granting summary judgment to the CGL insurer, the court ordered the D&O insurer to reimburse the CGL insurer for its equitable share of the defense costs. The court ruled that this equitable reimbursement did not include any costs the CGL insurer incurred in defending the injurious falsehood claims to the extent that those claims were covered by both the D&O and CGL policies or were covered solely by the CGL policy.