

Court Addresses Differing Retentions in Separate Coverage Parts

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In an unreported decision, a Pennsylvania trial court held that where the allegations in a complaint implicated the D&O coverage part (with zero retention) of a professional liability policy, that coverage part governed coverage for the complaint, even though some of the allegations in the complaint would also have been covered by the Employment Practices Liability (EPL) coverage part, which had a \$1 million retention. *Steinberg v. Syndicate 212 at Lloyd's of London, et al.*, 2003 WL 22119866 (Pa. Ct. C.P. Sept. 8, 2003).

The insurer issued a professional liability to a company. The policy contained four coverage parts, including one for D&O liability and one for EPL. The EPL coverage part contained an exclusion for "that portion of Loss which is covered under any other Coverage Section of this Policy." The D&O coverage part had no retention; the EPL coverage part had a \$1million retention. The General Terms and Conditions section of the Policy provided that when two or more coverage parts of the Policy apply, "the total applicable Retention shall not exceed the largest single Retention."

The company and certain of its directors were named in a lawsuit by a former employee who alleged that the company and its directors had breached a shareholders agreement he had entered into with the company, which contained a provision for the buyback of stock at certain predetermined prices if he left the company. The plaintiff filed suit contending that the company breached the agreement by, among other things, failing to inform him of certain plans to merge or sell the company. He alleged violations of various securities laws, breach of contract and fraud. After the directors sought coverage under the policy, the insurer took the position that the \$1 million retention of the EPL coverage part applied, and litigation ensued.

The court held in favor of the directors. The court first concluded that all of the allegations were covered under the D&O coverage part. Accordingly, the court reasoned that because the EPL coverage part expressly excluded loss covered under any other coverage part, no coverage was available under that coverage part and the retention in the EPL coverage part could not apply. The court rejected the insurer's argument that the provision in the general terms and conditions section addressing multiple retentions applied, explaining that the provision would be relevant only if coverage were available under multiple coverage parts. The court concluded: "Even though certain claims may also fall under the EPL section, the EPL Exclusion precludes such coverage and, as a result, the applicable retention is that of the D&O Section, zero."

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