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NEWSLETTER

Court Rejects Excess Insurers' Purported Effort To Forum Shop

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Invoking the doctrine of forum non convenes and principles of comity, the Appellate Division of the New Jersey Superior Court has rejected the effort by two excess insurers to avoid coverage litigation before the same court as the primary insurer. *TIG Ins. Co. of Michigan v. Wojtunik*, 2009 WL 4824500 (N.J. Super. Ct. App. Div. Dec. 16, 2009).

The case involved directors and officers liability coverage for a fiber optics company that acquired another entity by merger. Following the merger, it was revealed that there had been a massive accounting fraud at the insured and that the financial statements relied on by the acquired entity in connection with the merger negotiations were false and misleading. The former president of that entity, who received stock as part of the transaction, filed suit against the insured and certain of its directors and officers in federal court in Pennsylvania alleging securities fraud. The case subsequently was transferred to federal court in Arizona, following a finding by the Pennsylvania court that Arizona was a more appropriate forum in light of the fact that the insured was based in Arizona, the individual defendants as well as most key witnesses were residents of Arizona, the alleged misrepresentations at issue occurred in Arizona and Arizona law governed the merger transaction.

The securities fraud action was tendered by the individual defendants to the company's primary insurer and two excess insurers. Citing to the plaintiff's purported status as an officer of the insured entity, the insurers denied coverage based on the insured v. insured exclusion set forth in the primary policy. The defendant insureds then filed suit against the primary insurer alone in Arizona, seeking a declaration of coverage. Ruling on cross-motions for summary judgment, the court hearing the coverage action found that the insured versus insured exclusion did not apply because the plaintiff had not been a "duly elected" officer of the company and therefore was not an insured within the meaning of the primary policy. The court also held that the doctrines of estoppel and waiver precluded the primary insurer from invoking an alternative coverage defense that had not been raised in the primary insurer's original notice of denial.

The primary insurer appealed the summary judgment ruling. While the appeal was pending, the underlying plaintiff who previously settled with the directors and officers and received an assignment of their rights under the primary and excess policies, filed a writ of garnishment against the primary insurer in the securities action. The primary insurer subsequently settled with the plaintiff for full payment of its limit of liability. Before the

settlement was finalized, however, the excess insurers initiated suit in New Jersey state court, seeking a declaration of no coverage for the securities fraud action based on the same grounds unsuccessfully asserted by the primary insurer in Arizona. Shortly thereafter, and once the primary policy had been exhausted, the underlying plaintiff filed a writ of garnishment against the first excess layer insurer in the securities fraud action.

The first excess insurer filed a motion seeking to have the Arizona court abstain from addressing the writ in light of the pending coverage action in New Jersey. While that motion was pending, however, the trial court in New Jersey granted the motion of the underlying plaintiff, as the assignee of the individual's rights under the excess policies, to dismiss the coverage action. The appellate court found that both the relevant public and private interest factors favored Arizona as a forum over New Jersey. Specifically, the appellate court highlighted the fact that the insurers were licensed to do business in Arizona, the policies covered losses due to the wrongdoings of directors and officers of an Arizona corporation, and that Arizona law applied to the construction of the policies. The appellate court also noted that the same factors that justified the transfer of the original securities fraud action from Pennsylvania to Arizona supported dismissal here.

Additionally, the appellate court concluded the dismissal was warranted on comity grounds. In this regard, the court found that, even though the excess insurers filed their New Jersey action prior to the insured filing its writ of garnishment against the first excess insurer in Arizona, the excess insurers did not deny being fully aware of the Arizona proceedings and did not seek to intervene even after the primary insurer sought to compel their joinder as necessary parties. Furthermore, although the parties and issues were not exactly the same, the fact that the excess policies followed form to the primary policy and that the excess insurers would eventually be brought before a court in Arizona on a writ of garnishment was sufficient for dismissal on comity grounds. The appellate court also noted that the excess insurers were in substantially the same position as the primary insurer.