wiley

NEWSLETTER

Exclusion Carve-Back for "Derivative Claims" Not Applicable To State AG Investigation

September 2011

The United States District Court for the Eastern District of New York has held that the phrase "derivative or shareholder class action claims" can only reasonably mean derivative claims brought in the name of the corporation or direct shareholder class action claims brought by shareholders. *Hollis Park Manor Nursing Home v. Landmark Am. Ins. Co.*, 2011 WL 2945826 (E.D.N.Y. July 21, 2011). The court deemed the phrase unambiguous and held that a state attorney general's investigation of the insured was not a derivative claim.

The insurer issued a D&O policy to a nursing home containing exclusions for claims arising out of medical or professional malpractice and the performance or failure to perform professional services. Both exclusions had a carve-back for "any derivative or shareholder class action claims." Following commencement of an investigation by the New York State Attorney General's Office, the nursing home filed a declaratory judgment action seeking defense and indemnification. In doing so, the insured argued that the AG investigation was a derivative claim because it derived from the failure to supervise those who performed or failed to perform professional services.

The court agreed with the insurer's argument that common legal usage, the Federal Rules of Civil Procedure, New York law and other policy provisions all direct that "derivative or shareholder class action claims" can only reasonably mean derivative claims brought in the name of the corporation or direct shareholder class action claims brought by shareholders to enforce some other law. Consequently, the court held that because the AG's investigation was not a derivative claim, the malpractice and professional services exclusions applied to bar coverage.