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NEWSLETTER

Based on "Other Insurance" Clause, D&O Insurer Has No Duty to Defend Suit Covered by General Liability Policy

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The United States District Court for the Southern District of New York has held that a directors and officers liability insurer had no duty to defend an underlying lawsuit–and thus no duty to share in defense costs with a general liability insurer–where the D&O policy at issue contained an "other insurance" clause making that policy excess to the general liability policy. The court determined that the D&O insurer had no duty to defend even though certain causes of action were covered by the D&O policy, but not the general liability policy. *Admiral Indem. Co. v. Travelers Cas. & Sur. Co. of America*, 2012 WL 3194881 (S.D.N.Y. Aug. 8, 2012).

The insured, a condominium association, purchased commercial general liability insurance and D&O coverage from two insurers. After a lawsuit was brought against the insured, the general liability insurer filed a declaratory judgment action against the D&O insurer, alleging that the D&O insurer was obligated to pay all or part of the costs the general liability insurer incurred in defending the insured in the underlying action. The general liability insurer claimed that it was entitled to recover a portion of its defense costs because the D&O insurer had a duty to defend the insured in the underlying action. Both insurers moved for summary judgment.

Granting summary judgment in favor of the D&O insurer, the court concluded that the D&O insurer had no duty to defend the insured in the underlying action. In so doing, the court first found that the "other insurance" clauses in the policies–when read together–were complementary, rendering the coverage afforded under the D&O policy excess to that afforded by the general liability policy. The court explained that the other insurance clause in the general liability policy provided that it was "primary" and that the general liability insurer's "obligations are not affected unless any of the other insurance is also primary." In contrast, the D&O policy stated that, if any other insurance policy provided coverage, "then this Policy shall apply only in excess of the amount of any deductibles, retentions and limits of liability under such other insurance."

The court then rejected the general liability insurer's argument that both insurers should equally share the defense costs because the general liability policy only covered several of the alleged causes of action. According to the general liability insurer, because the D&O insurer would have had to pay for the remainder of the causes of action had they been successful, the D&O insurer should have to reimburse the general liability insurer for the defense costs of those claims. The court disagreed, noting that the general liability

insurer had a duty to defend the entire action and that the D&O insurer's duty to contribute if liability were found against the insured did not alone require it to share in the defense costs.

The court also rejected the general liability insurer's argument that a revised general liability policy, which contained a different other insurance clause and was issued while the underlying action was ongoing, should apply to the underlying lawsuit. The general liability insurer argued that the revised policy's other insurance clause was an "excess" clause and thus should operate to "cancel out" the D&O policy's other insurance clause, meaning that both policies would be treated as primary. The court explained that "[the general liability insurer] points to no case where a primary insurer was able to turn its responsibility for defense costs into excess coverage . . . after it had already incurred the obligation to pay for the defense costs of an ongoing litigation."