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ALERT

Other Insurance: D&O Policy Is Excess of CGL Policy

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The Court of Appeals of New York has held that, pursuant to the "other insurance" clauses of a commercial general liability (CGL) policy and a directors and officers (D&O) liability policy, the CGL policy served as primary coverage for two underlying suits and was obligated to cover all of the defense costs associated with them, even though those suits asserted only one cause of action potentially covered by the CGL policy and numerous other causes of action covered by the D&O policy. *Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co.*, 2011 WL 649812 (N.Y. Feb. 24, 2011).

The CGL insurer and D&O insurer each issued policies to the insured, a property owners association. The CGL policy's "other insurance" clause provided that its insurance was primary (except when excess over certain types of insurance not involved in this case) and that its obligations remained the same "unless any of the other insurance is primary." The D&O policy's "other insurance" clause provided that if any other valid policies covered a "Loss," the policy would cover the "Loss ... only to the extent that the amount ... is in excess of the amount of such other insurance." The D&O policy defined "Loss" as the total amount which the Insured(s) becomes legally obligated to pay ... including Defense Costs."

The insured and its officers were sued in federal court, and then in state court, by a neighboring property owner alleging that the insured's officers had made false statements and fraudulent claims regarding the property owner's right to access its property over certain roads. The suits asserted numerous causes of action, including injurious falsehood. The CGL insurer demanded that the D&O insurer cover the defense costs for these suits because, according to the CGL insurer, only the injurious falsehood claim could trigger a defense

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obligation under the CGL policy and the other causes of action involved D&O issues. Relying on its "other insurance" clause, the D&O insurer refused, and the CGL insurer provided a defense in both cases under a reservation of rights.

In the ensuing coverage litigation, the Court of Appeals held that the CGL insurer was obligated to defend as to all of the claims. The court noted the insurers' agreement that both of their policies potentially covered the injurious falsehood claims. Pursuant to the "other insurance" clauses in both policies, the court explained, the CGL policy was primary as to coverage for those claims. Moreover, the court held, the CGL policy's primacy on the injurious falsehood claims also triggered a primary duty to defend as to the remaining causes of action. This result followed because, under New York insurance law, an insurer is required to defend an entire action if any claim asserted in it might be covered, even if additional claims are not covered. Given the undisputed possibility of coverage for the injurious falsehood claims under the CGL policy, the CGL insurer was required to defend the entirety of both underlying actions, the court concluded. Thus, because there was "other insurance" available to cover the "Loss" (*i.e.*, defense costs), the court held that the D&O insurer was not required to share in the defense.