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ALERT

Exclusion for Liability "Assumed or Asserted" Under Contract Is Not Limited to Claims Under Indemnity Agreements

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The United States District Court for the Middle District of Alabama has held that an exclusion precluding coverage for liability "assumed or asserted" under contract is unambiguous and not limited in application to claims involving liability assumed under an indemnity agreement. *Landmark Am. Ins. Co. v. The Indus. Dev. Bd. of the City of Montgomery*, 2013 WL 4788588 (M.D. Ala. Sept. 9, 2013).

The insured development company entered into option contracts with a group of landowners for the right to purchase land in exchange for price guarantees. The landowners brought several suits against the development company for breach of contract. The company reported the suits to its D&O insurer, which denied coverage on the basis of a contract exclusion. That exclusion precluded coverage in connection with claims "arising out of or based upon any actual or alleged liability" of the insured "assumed or asserted under the terms, conditions, or warranties of any contract or agreement . . . ."

In the coverage litigation that followed, the development company argued that the contract exclusion was implicated only in the case of liability assumed under an indemnity contract. In support of this position, the development company pointed to case law indicating that the term "assumed" meant the assumption of liability under an indemnity agreement. The trial court, however, noted that the exclusion also included the term "asserted," which the court found to incorporate the breach of any contract, including the insured's own contracts.

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The court also rejected the insured's argument that its "reasonable expectations" required a finding of coverage because the exclusion was unambiguous. In this regard, the court recognized that the development company was a "sophisticated entit[y]" and ruled that enforcing the exclusion as written was not unconscionable or violative of public policy.