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CORPORATE INSURANCE LAW

Expert Analysis

Dispute Resolved Over Overlapping GL and D&O Insurance Policies

In a decision issued late last month, the Court of Appeals held that the duty to defend owed by a general liability (GL) carrier required the GL carrier to defend the insured against all claims in the underlying lawsuit, even where many of the claims in the lawsuit were potentially covered under a directors' and officers' (D&O) policy issued by another insurer and only one of the claims was potentially covered by the GL policy.

The decision issued in *Fieldston Property Owners Association Inc. v. Hermitage Insurance Co.*[1] resolved a split between two First Department panels that we discussed in this column on Sept. 4, 2009.[2] In so ruling, the Court of Appeals emphasized the importance of the GL carrier's duty to defend and the D&O carrier's excess Other Insurance clause, finding these contract terms to be decisive. The Court of Appeals' decision, authored by Judge Carmen B. Ciparick, reversed the underlying First Department ruling which would have required the D&O carrier to contribute to the defense and granted summary judgment to the D&O carrier.[3]

Underlying Action

In the underlying case, Chapel Farm Estates commenced an action in federal court against Fieldston Property Owners Association alleging that Fieldston's officers had made false claims and statements concerning the claimants' right to access certain property for the purpose of a construction project. The federal complaint alleged eight causes of action, including a claim for injurious falsehood. After the federal action was dismissed, Chapel commenced a second lawsuit in state court based on the same set of operative facts, this time asserting more than twice as many causes of action, including a claim for injurious falsehood, and seeking declaratory and injunctive relief and damages.

By **Howard B. Epstein**

And **Theodore A. Keyes**

New York state courts have issued inconsistent rulings on the legal significance of a certificate of insurance in disputes over the existence of coverage.

Fieldston tendered both lawsuits to its GL carrier and its D&O carrier. The GL carrier agreed to defend but reserved its right to disclaim, advising Fieldston that the injurious falsehood claim was the only potentially covered claim. The GL carrier also reserved the right to seek contribution from the D&O carrier, contending that the majority of the claims were covered under the D&O policy. The D&O carrier refused to provide defense costs coverage on the grounds that its Other Insurance clause made it excess to the GL carrier with regard to any defense obligation.

Fieldston successfully moved to dismiss Chapel's injurious falsehood claim. At that point, claiming that none of the remaining causes of action were even potentially covered under the GL policy, the GL carrier demanded that the D&O carrier assume the defense. The D&O carrier agreed. Subsequently, two separate lawsuits were filed to resolve the carrier's respective defense cost obligations for the period prior to dismissal of the injurious falsehood claim, one by Fieldston and one by the GL carrier. In two separate rulings, the trial court granted summary judgment to Fieldston, finding that the GL carrier owed it a duty to defend, and denied summary judgment to both the GL carrier and the D&O carrier, finding their motions premature. The two cases were consolidated on appeal to the First Department.

First Department's Ruling

Before the First Department, the D&O carrier argued that the Other Insurance clause in the D&O policy, which was otherwise a primary policy, rendered the D&O policy excess to the GL policy.[4] The D&O policy's Other Insurance clause provided as follows: "If any Loss arising from any claim made against the Insured(s) is insured under any other valid policies prior or current, then This policy shall cover such Loss…only to the extent that the amount of such Loss is in excess of the amount of such other insurance whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over the limits provided in th[is] policy."[5]

The GL policy was not specifically written excess to the D&O policy and in fact was expressly a primary policy with a duty to defend and a primary Other Insurance clause. Consequently, the D&O carrier argued that the defense obligation fell solely on the GL carrier. The First Department rejected this position, holding that the Other Insurance clause was inapplicable because the GL policy and D&O

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policy did not provide concurrent coverage. According to the First Department's ruling, Other Insurance clauses are only applicable to resolve disputes over allocation between two policies that insure against the same risks. Since the GL and D&O policies insured against different risks, the First Department concluded that the Other Insurance clause did not govern the issue.

As a result, the First Department ruled that the GL carrier was entitled to contribution from the D&O carrier for an equitable share of all defense costs incurred, except for those incurred to defend the injurious falsehood claim. In so ruling, the First Department expressly refused to follow its own ruling in *Firemen's Ins. Co. of Washington, D.C. v. Federal Insurance Company*,[6] which would have compelled a different result.

Court of Appeals' Ruling

The Court of Appeals reversed, disagreeing with the First Department decision and issuing a ruling consistent with the result in *Firemen's*.[7] The Court focused first on the GL carrier's duty to defend, which, of course, is broader than the duty to indemnify, finding that the primary obligation to defend trumps the imposition of any defense obligation on the D&O carrier.

As the Court explained, because the GL carrier had the duty to defend, it was obligated to defend all of the claims asserted against Fieldston, as long as any of the claims arguably arose from covered events. It made no difference that only the injurious falsehood claim was potentially covered under the GL policy or that many of the underlying causes of action were outside the scope of the GL carrier's duty to indemnify and within the scope of the D&O carrier's duty to indemnify. The injurious falsehood claim alone was sufficient to trigger the GL carrier's broad obligation to defend.

With regard to the Other Insurance clause issue, the Court of Appeals held that the D&O policy's Other Insurance clause did in fact govern the D&O carrier's obligations, making it excess to the defense obligation owed by the GL policy. The Court did not expressly address the First Department's view that the Other Insurance clause was inapplicable due to the lack of concurrent coverage. However, the Court explained that, although the First Department's approach, which required the D&O carrier to share in the defense costs, had some equitable appeal, a contrary result was dictated by the express language of the policies.[8]

'Firemen's' and 'Sport Rock'

While the Court of Appeals' reversed the First Department ruling in *Fieldston*, the decision is consistent with two other First Department rulings issued in *Firemen's* and in *Sport Rock International v. American Casualty Company of Reading, PA*.[9] In *Firemen's*, presented with a fact pattern very similar to the one presented in *Fieldston*, a different panel of the First Department had also concluded that the GL carrier's obligation to defend was decisive, and that a D&O policy with an excess Other Insurance clause had no obligation to contribute to the insured's defense costs.[10]

Sport Rock was arguably distinguishable from *Fieldston* because there was no dispute in that case as to whether the two GL policies at issue covered similar risks. However, the *Sport Rock* court went out of its way to disagree with the First Department's *Fieldston* ruling, noting its approval of *Firemen's* and ruling that the primary GL policy with a duty to defend had no right to contribution from a GL policy with an excess Other Insurance clause, even where some of the claims arguably fell outside the scope of the primary policy's duty to indemnify but within the scope of the excess policy's duty to indemnify.[11]

Critics siding with the First Department's *Fieldston* ruling might contend that the Court of Appeals ignored the argument that Other Insurance clauses are only intended to govern allocation between insurance policies which insure the same risks. However, as the *Sport Rock* court noted, "the rule that risks be identical in order for an 'other insurance' clause to apply does not mean that the total possible coverage under each policy be the same, but merely that with respect to the harm which has been sustained there be coverage under both policies."[12] In that respect, the primary GL policy's duty to defend claims that are even outside the scope of its duty to indemnify (as long as some claims are within the scope of the duty to defend) constitutes other insurance within the meaning of the Other Insurance clause.[13]

Looking Forward

There appear to be two main points to take away from *Fieldston* and the related series of cases discussed in this column. First, the Court of Appeals again reaffirmed the prominent role and broad scope of the duty to defend. In these rulings, once the court determined that the primary GL carrier had a duty to defend, it was not compelled to look any further. That duty meant that the GL carrier was obligated to defend all of the claims, even those that were not even potentially within the scope of its duty to indemnify.

Second, the Court upheld the plain meaning of the excess Other Insurance clause, even where the clause appeared in policies that were otherwise primary policies. The Court determined that the excess clause relieved the carrier of any obligation to contribute to the primary carrier's duty to defend. The carrier with the duty to defend has a broad obligation to protect the insured and the Court was not inclined to require other carriers to contribute where the Other Insurance clause dictated the opposite result.

Since D&O policies typically do not contain duty to defend clauses, and often contain excess Other Insurance clauses, absent a change in policy language, it would appear that, under *Fieldston*, primary GL policies will continue to bear the defense cost obligation in most cases involving overlapping GL and D&O insurance.

1. *Fieldston Property Owners Association Inc. v. Hermitage Insurance Co. Inc.* __N.E.2d__, 2011 WL 649812 (N.Y.), 2011 N.Y. Slip. Op. 01361 (2011).
2. Epstein, Howard B. and Keyes, Theodore A., "Allocation of Defense Costs Among Overlapping Insurance," New York Law Journal, Volume 242-No. 47 (Sept. 4, 2009).
3. *Fieldston Property Owners Association*, 2011 WL 649812, 2011 N.Y. Slip. Op. 01361.
4. *Fieldston Property Owners Association Inc. v. Hermitage Insurance Co.*, 61 A.D.3d 185, 873 N.Y.S.2d 607 (1st Dept. 2009).
5. *Id.*, 873 N.Y.S.2d at 611.
6. *Firemen's Insurance Co. of Washington, D.C. v. Federal Insurance Co.*, 233 A.D.2d 193, 649 N.Y.S.2d 700 (1st Dept. 1996).
7. *Fieldston Property Owners Association*, 2011 WL 649812, 2011 N.Y. Slip. Op. 01361.
8. *Id.*
9. *Sport Rock International Inc. v. American Casualty Co. of Reading, PA*, 65 A.D.3d 12, 878 N.Y.S.2d 339 (1st Dept. 2009).
10. *Firemen's*, 233 A.D.2d at 193, 649 N.Y.S.2d at 700.
11. *Sport Rock*, 65 A.D.3d at 12, 878 N.Y.S.2d at 339.
12. *Id.*, 878 N.Y.S.2d at 350.
13. *Id.*, 878 N.Y.S.2d at 351.

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