

## NEW YORK HIGH COURT: "OTHER INSURANCE" CLAUSE RELIEVES D&O INSURER OF OBLIGATION TO SHARE DEFENSE COSTS WITH CGL INSURER

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In *Fieldston Property Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc.*, 2011 NY Slip Op. 01361 (Feb. 24, 2011), the New York Court of Appeals ruled that a D&O policy's excess "other insurance" clause relieved the D&O insurer of any obligation to reimburse a CGL insurer for defense costs incurred in connection with two underlying tort actions. In *Fieldston*, Hermitage Insurance Company issued an occurrence-based CGL policy to Fieldston Property Owners Association. Federal Insurance Company issued a "claims-made" directors and officers liability policy to Fieldston and its directors and officers which overlapped with portions of the CGL coverage period. Federal's D&O policy contained an other insurance clause which provided that its coverage was excess where "any Loss arising from any claim made against the Insured is insured under any other valid policy(ies)."

Fieldston and its directors and officers were sued in two underlying actions for claims of interference with property rights and publication of injurious falsehoods. Hermitage demanded that Federal defend the underlying actions, arguing that only the injurious falsehoods claim was potentially covered by its CGL policy, whereas several of the other claims were potentially covered under the D&O policy. Federal, however, declined to contribute to the defense of the underlying actions, taking the position that the other insurance clause rendered its coverage excess to the Hermitage CGL policy. Hermitage subsequently undertook the defense of both actions subject to a reservation of rights, and two declaratory judgment actions ensued seeking to determine the respective defense cost obligations of Hermitage and Federal.

The New York Supreme Court, Appellate Division held that Federal was required to reimburse Hermitage for defense costs incurred in the underlying actions, despite the existence of the excess other insurance clause. The appellate court explained that Federal's other insurance clause was inapplicable because the "CGL and D&O policies do not provide concurrent coverage as they do not insure against the same risks." Thus, the court concluded that Federal, as a primary insurer, was obligated to share equitably in the defense of the actions with Hermitage, except as to the single "injurious falsehoods" claim which fell within the scope of the CGL coverage.

The New York Court of Appeals, relying primarily on the language of the other insurance clause and duty to defend under New York law, disagreed with and reversed the Appellate Division's decision, holding instead that Hermitage was not entitled to any reimbursement for defense costs from Federal. The court pointed out that, under New York law, a single, potentially covered claim triggers an insurer's duty to defend an entire action, irrespective of whether any of the additional claims may be covered. Based on such a broad duty to defend, together with the possibility that the CGL policy at issue covered at least the injurious falsehoods claim, the court held that Hermitage was solely obligated to defend both underlying cases in their entirety, even though Federal might eventually have a duty to indemnify a larger proportion of the claims. Thus, as the court explained, "under the terms of Federal's D&O policy, there does exist 'other insurance' which would cover the 'loss' arising from the defense of the two underlying actions." While acknowledging

the “equitable appeal” of the decision reached by the Appellate Division, the Court of Appeals stated that it could not “judicially rewrite” the plain language of the policies at issue in order to fashion a more equitable result.

The *Fieldston* decision seems to have resolved the apparent conflicts in the lower New York appellate courts regarding the applicability of other insurance clauses in determining allocation of defense costs among overlapping policies. As a general rule, courts will only consider an other insurance clause in a policy when there is concurrent coverage between the policies at issue. For that reason, other jurisdictions may

favor a different approach than that of the *Fieldston* court when the policies insure different risks. As courts may vary on the precise meaning of “concurrent coverage,” this issue should be closely analyzed and monitored on a state-by-state basis.

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*To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Joshua P. Broudy ([jbroudy@cozen.com](mailto:jbroudy@cozen.com) or 215-665-4624).*