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ALERT

"Other Insurance" Clause Inapplicable Where Policies Cover Different Risks

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A federal district court has held that an insurer could not rely on its policy's "other insurance" clause, which provided that the policy was excess to any other insurance policies, where the policy and the putative other insurance did not cover the same risks. *Federal Ins. Co. v. Firemen's Ins. Co. of Wash., D.C.*, 2011 WL 503185 (D. Md. Feb. 9, 2011). However, the court determined that the other insurer must contribute to the defense of the underlying claim, as its policy was nonetheless triggered by the allegations made by the underlying claimant.

The court considered the extent of coverage that separate insurers were obligated to provide to mutually insured entities. The insureds, a parent company and subsidiary that provided home remodeling services, were defended by their D&O liability carrier in an arbitration that arose out of property damage caused by faulty construction work. Although the claimant instituted the arbitration against the insureds, the allegedly faulty construction work was performed by a franchisee of the insured subsidiary. Under the franchise agreement, the franchisee could use the subsidiary's service mark and logo so long as it named the subsidiary as an additional insured under its general liability policy. Accordingly, the D&O insurer that defended the underlying arbitration subsequently brought suit against the general liability carrier, asserting that the other carrier had primary responsibility to defend the arbitration. In making its argument, the D&O carrier relied upon the "other insurance" clause in its policy, which provided that its policy was excess of "any other valid and collectible insurance . . . whether such insurance is stated to be primary, contributory, excess, contingent or otherwise."

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In resolving cross-motions for summary judgment on the other insurance issue, the court first noted that the D&O policy and the general liability policy covered the insured "for different risks." Referencing a variety of case law, the court then determined that, because the two policies applied to different exposures, the D&O policy's "other insurance" provision was inapplicable. In doing so, however, the court also noted that simply because the other insurance provision did not apply did not resolve the issue, because the general liability policy nonetheless was triggered by the underlying claim. Accordingly, the court requested further briefing from the parties regarding what amount should be awarded to the D&O carrier from the general liability carrier on a theory of contribution.