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ALERT

Primary Insurer Does Not Owe Direct Duty of Care to Excess Insurer

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The United States District Court for the District of Colorado, applying Colorado and Utah law, has held that a primary insurer does not owe a direct duty of care to an excess insurer and that an excess insurer therefore cannot pursue a negligence claim against a primary insurer. *Okland Construction Co. v. Phoenix Ins. Co.*, 2013 WL 3866608 (D. Colo. Jul. 26, 2013).

A construction company purchased a series of one-year commercial general liability policies from a primary carrier from 2004 through 2010. The same company purchased excess policies from a different insurer for the period of 2007 to 2010.

The primary insurer provided a defense to the company subject to a reservation of rights and, in its initial correspondence to the insured company, referenced the 2005-2010 primary policies as "under consideration for coverage." The primary insurer later added the primary policy for the 2004-2005 policy period as a policy "under consideration for coverage." The excess insurer received copies of the primary insurer's coverage letters and concluded that the primary insurer was "defending and indemnifying the insured up to policy limits on the 04/05 policy." The excess insurer also concluded that the later policy years, including its own, were not implicated by the underlying litigation and, in March 2011, sent a letter to the insured advising it that the excess insurer was closing its file. The excess insurer copied the primary insurer on its closing letter but did not otherwise communicate with the primary insurer about its interpretation of the primary insurer's coverage position.

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In August 2011, the excess insurer was informed of a mediation and demand from the insured to settle the underlying litigation. In September 2011, the excess insurer discussed the matter with the primary carrier, and the primary insurer clarified that it had not identified the policy year that was triggered. On October 3, 2011, the primary insurer informed the excess insurer that it had identified the 2009-2010 policy as the policy implicated by the underlying litigation and that it had agreed to tender its $1 million limit of liability on that policy. On October 7, 2011, the parties agreed to settle the underlying litigation for $11.5 million at a mediation, which the excess insurer attended. The excess insurer did not commit to provide funds for the settlement and, in January 2012, informed the insured that coverage was not available under its excess policies.

In the ensuing coverage litigation, the excess insurer asserted a cross-claim for negligence against the primary insurer and alleged that the primary insurer failed to provide information about the underlying litigation, the policy years that might be implicated, and the excess insurer's potential exposure.

The court agreed with the primary insurer that the primary insurer did not owe a direct duty to the excess carrier and noted that policy considerations weighed against allowing such negligence claims. The court stated that the national trend among courts was not to recognize such a duty and that general negligence principles supported this outcome. In addition, the court noted that the excess insurer was aware of the underlying litigation and primary insurer's coverage position but made "virtually no effort to investigate or resolve [the insured's] claim based on an obviously incorrect interpretation of [the primary insurer's] position regarding coverage." Accordingly, the court found that "there is no legal justification to hold [the primary insurer] responsible for [the excess insurer's] failure to protect its own interests."