

July 7, 2020

TLSS Partners Stephen D. Straus and Eric D. Suben Obtain Summary Judgment in Favor of Insurer on Prisoner Claim

Related Attorneys: Stephen D. Straus, Eric D. Suben

In the underlying claim, an inmate of Sing Sing prison sued the State of New York in the Court of Claims, alleging respiratory ailments as a result of airborne construction debris during renovation of the prison facility. The State, in turn, brought a third-party claim against its construction contractors' insurers, seeking defense and coverage as an additional insured under their policies. TLSS, representing one such contractor's excess insurer, initially moved to dismiss the third-party claim based on lack of subject matter jurisdiction, arguing that by statute, the Court of Claims cannot consider application of policy exclusions presenting a jury issue. The court granted TLSS' motion with respect to the duty to indemnify but denied the motion with respect to the duty to defend, holding that the Court of Claims has jurisdiction to decide that issue as a matter of law.

TLSS then moved for summary judgment, arguing that there was no duty to defend under the excess policy as a matter of law because: 1) the excess policy did not "drop down" to defend unless and until the underlying primary policy was properly exhausted by the payment of loss, which had not occurred; 2) the prisoner's *ad damnum* in the underlying claim was within the underlying primary limit; and 3) the "loss payable" clause provided that the excess insurer was not required to incur any cost unless agreed to in writing with the insured and the primary insurer, which had not occurred. The Court of Claims granted TLSS' motion, holding that there was no obligation to defend or indemnify the State because no obligation to provide excess coverage was triggered under the excess policy wording.