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Federal Court Holds That Other Insurance Analysis Is Unnecessary If Policies Cover Different Risks

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In *Greater Mutual Insurance Company v. Continental Casualty Company*, 2020 WL 5370419 (S.D.N.Y. September 8, 2020), the United States District Court for the Southern District of New York had occasion to consider the "other insurance" provisions of a commercial general liability policy, issued by Greater Mutual Insurance Company ("GNY"), and a directors and officers ("D&O") policy, issued by Continental, to the same insured. The GNY policy covered, *inter alia*, property damage caused by an occurrence, as well as "personal advertising injury," defined to include "[t]he wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor." The Continental D&O policy covered claims for wrongful acts, including "wrongful entry or eviction, or other invasion of the right to private occupancy. . . ." Unlike the GNY policy, however, the Continental policy expressly excluded coverage for damage to tangible property.

In the underlying action, the plaintiffs alleged that the insured engaged in construction work to fix a leak from a terrace on the seventeenth floor. In doing so, the insured accessed the plaintiffs' roof terrace. The plaintiffs alleged that the construction workers installed and stored construction materials on the roof terrace, making the plaintiffs unable to access the terrace. Plaintiffs also alleged that their deck furniture may have suffered damage, and that the workers had a "direct line of sight" into their unit, resulting in the plaintiffs having to leave their unit frequently. Causes of action were for property damage, constructive eviction, partial constructive eviction, and invasion of privacy.

GNY accepted a primary defense coverage obligation, based on the allegation that there may have been property damage. Continental asserted an excess position, based on its "other insurance" clause, which specified that the D&O policy is excess "[i]f any Loss resulting from any Claim is insured under any other policies." "Loss" was defined as "Defense Costs ... on account of a covered Claim," and "Claim" was defined in relation to a "wrongful act," *i.e.*, an act by the insured in an insured capacity.

The court held that the Continental D&O policy was excess only where both policies cover the same risk, because the "Claim" insured by the other insurer must also be insured under the Continental policy for the "other insurance" to come into play. If both policies cover different risks, they would be co-primary. The court found that the property damage claim was unequivocally covered by the GNY policy and not covered by the Continental D&O policy. However, with respect to the constructive eviction, partial constructive eviction, and invasion of privacy causes of action, the court determined that the papers were not sufficient to decide as a matter of law whether both policies covered such risks. Although the Continental policy covered such claims, GNY argued that its wrongful eviction coverage was limited to liability for intentional dispossession, which was not alleged. The court could not determine as a matter of law whether the allegations were covered under GNY's policy. As such, the court denied summary judgment for both parties.

The case illustrates the need to carefully read and analyze the "other insurance" provisions of policies when two or more policies are implicated for the same claim or suit. As the court noted, the Continental policy could have more broadly asserted an excess position by defining loss to include all claims, not just covered claims. By using the term "covered claims," Continental was unable to obtain a declaration of excess coverage on a summary judgment standard.

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