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Lack of Control by Insured Over Related Companies Results in Denial of Coverage

March 4, 2012 by Gerard M. Giordano

In *Newport Associates, Phase 1 Developers Limited Partnership v. Travelers Casualty and Surety Company*, No. HUD-L-3070-09 (New Jersey L. Div. January 24, 2012), plaintiff developers brought a declaratory judgment action against its comprehensive general liability and excess insurance carriers seeking indemnification for cleanup costs related to a site located in Jersey City, New Jersey. Coverage was denied based on two facts: (i) plaintiffs were not named insureds under the policies; and (ii) the excess policies contained an absolute pollution exclusion clause.

The comprehensive general liability insurer issued a policy to an affiliate of the plaintiffs (the “Insured”). The policy defined “named insured” to include entities controlled by the Insured. The plaintiffs contended that they should be included as named insureds.

The Court, in determining whether the plaintiffs were named insureds, focused on the interpretation of the term “controlled,” which was not defined in the comprehensive general liability policy. In reviewing both common law and statutes defining the concept of “control,” the Court concluded that for the plaintiffs to be named insureds, the Insured had to own an interest in the plaintiffs of 50% or more. Because the Insured owned less than 50% interest in the plaintiffs, the Court held that the plaintiffs are not named insureds under the policy.

The second issue addressed by the Court was the absolute pollution exclusion provision contained in the excess policies. Plaintiffs contended that because the excess insurers made misrepresentations to the State Insurance regulators regarding the exclusion, the court should not apply the absolute pollution exclusion clause to preclude coverage.

The Court held that because the policies at issue were issued after 1982, the date of the passage of the law exempting the umbrella and excess policies from regulations governing CGL policies, the absolute pollution exclusion clause was not invalid. Accordingly, the Court held the absolute pollution exclusion in the excess umbrella policies to be applicable. The Court granted summary judgment to the insurers on both issues.

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