Alert
March 7, 2016

Global Insurance Alert
News Concerning Professional Liability Issues

COZEN O'CONNOR

Allocation Clause Held Enforceable in a Duty To Defend D&O Policy

In *Housing. Auth. of New Orleans v. Landmark Ins. Co.*, 2016 U.S. Dist. LEXIS 24419 (E.D. La. Feb. 29, 2016), the court provided a rare analysis of the interplay between a duty to defend in a D&O policy and the allocation clause in that same policy. The court held that the allocation clause was unambiguous and enforceable.

Discussion

The underlying action arose out of the demolition of the "Big Four" public housing developments in New Orleans following Hurricane Katrina. Landmark initially advanced defense costs for certain claims under a reservation of rights, but according to HANO, stopped advancing defense costs in the middle of the litigation because Landmark contended it was no longer liable for any loss. After settling the underlying action, HANO brought suit against Landmark for indemnity and defense costs for the entire litigation. HANO claimed that (1) the allocation clause was unenforceable as against public policy under Louisiana law, (2) the allocation clause was unenforceable because it was ambiguous and (3) HANO had not agreed with Landmark to a 50/50 allocation at the outset of the litigation, as Landmark contended.

The D&O policy provided a duty to defend as follows: "It shall be the right and duty of the **Insurer** to defend any **Claim** against the **Insured** for which coverage applies under this policy."

The allocation clause stated in relevant part:

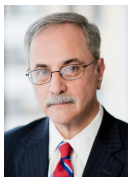
> If both **Loss** covered under this policy and loss not covered under this policy are jointly incurred either because a **Claim** includes both covered and non-covered matters or covered and non-covered causes of action or because a **Claim** is made against both an **Insured** and any other parties not insured by this policy, then the **Insured** and the **Insurer** shall use their best efforts to fairly and reasonably allocate payment under this policy between covered **Loss** and non-covered loss based on the relative legal exposures of the parties with respect to covered and non-covered matters or covered and non-covered causes of action.

Although Louisiana, like many states, interprets the duty to defend broadly, requiring insurers to defend an entire action whenever a single cause of action is potentially covered, the court found that parties are free to limit the duty to defend by contract. The court noted that "[b]y its own terms, the Duty to Defend clause does not require Landmark to defend any claim … that could potentially fall within the policy as does the typical duty to defend in a general liability policy…." In addition, the allocation clause, unambiguously abrogated the normally broad duty to defend, and "Landmark had the right to allocate defense expenses under the agreement." Further supporting its interpretation of the allocation clause with the duty to defend, the court noted that most D&O policies do not contain a duty to defend and HANO should not have reasonably expected the Landmark policy to include such a duty.

Accordingly, the court concluded as follows:

> Read together, Landmark's duty to defend is apparent. If the claim is covered, the insurer must provide a defense. If the claim is only partly covered, the parties need to work to allocate expenses. If the claim is not covered, then there is not duty to defend.

The court also rejected the argument that the allocation clause was against public policy. Although no Louisiana Civil Code provisions nor Louisiana cases were found directly on point, the court noted that courts from other jurisdictions had held allocation clauses to be enforceable and the



Angelo G. Savino

Chair,
Professional
Liability
Practice Group

asavino@cozen.com
Phone: (212) 908-1248
Fax: (917) 521-5854

Related Practice Areas

- Insurance Coverage
- Professional Liability
- Professional Liability Insurance Coverage

Louisiana Department of Insurance had accepted policies with allocation clauses. These authorities, although not binding, persuaded the court that Louisiana public policy did not prohibit the enforcement of an allocation clause in a duty to defend policy.

Having found the allocation clause fully enforceable, the court found that an issue of fact existed as to the amount of a proper allocation of defense costs between the parties. The court rejected Landmark's argument that the parties had agreed to a 50/50 allocation at the outset of the underlying action and thus a fact finder would need to determine the amount of a proper allocation.

Conclusion

It is not common for judicial decisions to analyze the interplay between a duty to defend in a D&O policy and an allocation clause in that policy. The *HANO* case illustrates that courts will enforce the allocation requirement in such a policy as unambiguous and not contrary to an insured's reasonable expectations. It is worth noting, however, that the duty to defend in *HANO* was more limited than the far more common duty to defend any potentially covered claims. Nevertheless, *HANO* recognizes that parties are free to contract their way out of the broad duty to defend. Thus, an allocation clause may be construed as a contractual limitation on a duty to defend.

To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact Angelo Savino at (212) 908-1248 or asavino@cozen.com.