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Expert Analysis

First Department Decisions in Conflict Over 'Other Insurance' Provisions

In the decision *Sport Rock Intern. Inc. v. American Cas. Co. of Reading, Pa.*,—N.Y.S.2d—, 2009 WL 1290266 (1st Dept., May 12, 2009) the Appellate Division, First Department, broadly addressed the appropriate allocation of defense costs between two primary liability insurance policies, where one policy's "other insurance" clause made it excess to the other.

As more fully set forth herein, the majority consciously highlighted its conflict with another First Department decision that was recently decided, revealed some considerable friction among the judges, but nevertheless provided some clarity to insurance carriers and their counsel who wish to give effect to the "other insurance" provisions in their policies.

The case arose from a climbing wall accident, when an employee of a health club attached the support line to a non-weight bearing loop on a club member's climbing harness. The injured club member brought a lawsuit against the health club, as well as the seller of the harness, plaintiff Sport Rock Intern. Inc. (hereinafter Sport Rock), and Petzl America Inc., the manufacturer of the harness. The subject declaratory judgment action pitted the general liability carrier for Sport Rock, Evanston Insurance Company (Evanston), against the carrier for the manufacturer of the harness, American Casualty Company of Reading, Pa. (American).

The "other insurance" provision of Sport Rock's Evanston policy stated that it would be excess over other additional insurance Sport Rock had as a result of being a vendor for a manufacturer's products. The "other insurance" provision of Petzl's American policy did not provide grounds to claim excess status, and accordingly, provided it would contribute with other available primary insurance on a "pro rata" basis.

Norwithstanding American's acknowledgement that Sport Rock was an additional insured pursuant to its vendor's endorsement and that its policy was primary pursuant to the "other insurance" provisions, American refused to bear the entire cost of the defense on the grounds that the complaint contained claims that were not covered under the vendor's endorsement,

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such as the claim that Sport Rock had negligently installed the wall and the claim that the landing mats were defective. Based on its own assessment of the proportion of the claims that were covered in the action, American offered to cover 10 percent of Sport Rock's defense.

'General Motors' Case

In support of its position, American cited the Court of Appeals' decision, *General Motors Acceptance Corp. v. Nationwide Ins. Co.*, 4 N.Y.3d 451 (2005), where the Court directed an allocation of defense costs between two primary policies even though one was

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excess to the other by reason of the competing "other insurance" provisions.

While the *Sport Rock* court acknowledged that *General Motors*, "could be read as a departure from prior case law giving effect to one policy's excess 'other insurance' clause..." [*Sport Rock*, 2009 WL 1290266 at 8], it distinguished *General Motors* on its facts and held that Evanston was not obligated to defend Sport Rock until American's coverage has been exhausted. In so doing, the court found that this result would not be affected by the fact that the Evanston policy covered all claims asserted in the complaint while the primary American policy only covered certain claims.

Sport Rock's discussion of the *General Motors* decision may be the most important legacy of the case. In *General Motors*, the Court of Appeals did seem to take the position that an insurer that issued a

primary policy could not avoid its obligations to provide coverage by reference to the "other insurance" provision in the policy. Indeed, it stated the following:

Both [insurers] issued primary policies commensurate with their respective expectations and bargained-for rights and obligations. Therefore, requiring both [insurers], as coincidental primary insurers having the same policy limits, to contribute equally to defense costs is consistent with the requirement that insurance contracts be interpreted "according to the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract" (*Atlantic Cement Co. Inc. v. Fidelity & Cas. Co. of N.Y.*, 91 A.D.2d 412, 418 [1st Dept. 1983], affd 63 N.Y.2d 798 [1984]). It is also consistent with our general reluctance to relieve a primary insurer of its duty to defend (see generally *Fitzpatrick*, 78 N.Y.2d 61 [1991]). In this instance, it is apparent that both [insurers], by virtue of their status as primary insurers, and additionally through their course of conduct, could reasonably have expected to share the expense of the defense. *General Motors*, 4 N.Y.3d at 457.

Norwithstanding the Court of Appeals' obvious discomfort with allowing a carrier to transform its primary coverage to excess, at least under the circumstances of that case, the First Department in *Sport Rock* argued that the holding of *General Motors* was far more limited. It pointed to the Court's precise holding:

[w]here, as here, two coincidental primary policies exist—one excess to the other by reason of competing "other insurance" provisions—and where the excess carrier has voluntarily assumed and marshaled the insured's defense, an allocation of defense costs based on primary policy limits is appropriate. *General Motors*, 4 N.Y.3d at 453.

Thus, the *Sport Rock* court narrowly interpreted *General Motors* to stand for the proposition that an insurer can waive its right to enforce the competing "other insurance" provisions if it voluntarily assumed the defense of its insured. It is questionable whether the Court of Appeals viewed its own decision so narrowly. The Court in *General Motors* commented that:

While Firemen's primary policy coverage is deemed "excess" by virtue of other collectible insurance, the limiting language is directed to its obligation to contribute to a settlement or

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judgment, not to its duty to defend. *General Motors*, 4 N.Y.3d at 456.

Thus, a literal reading of the Court's opinion would lead one to the conclusion that the shifting of defense costs through competing other insurance provisions is never allowed. The *Sport Rock* court however, chose to ignore this aspect of the decision.

Sport Rock and *General Motors* raise the obvious question...how can an insurance carrier effectively preserve a claim of excess status? The Court in *General Motors* found a waiver, notwithstanding that the carrier explicitly reserved its right to claim excess status prior to accepting the defense of the common insured. In doing so, the Court seemed to have gone against well-settled law holding that "contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned." *Fundamental Portfolio v. Tocqueville Asset Management, L.P.*, 7 N.Y.3d 96, 817 N.Y.S.2d 606 (2006) (citation omitted).

The Court in *General Motors* seemed to find it relevant that the carrier upon accepting the defense "proceeded to defend the action in a manner that it deemed most appropriate..." This certainly does not seem a reasonable basis in itself to find a waiver. Nor did the Court seem justified in concluding that by accepting the defense under a reservation of rights, the carrier "embraced the specific language of its primary policy requiring it to 'defend any suit asking for [] damages.'" *General Motors*, 4 NY3d at 456.

To grasp the Court's holding in *General Motors* it is helpful to understand the context of the case, which involved an accident that left one of the plaintiffs in a permanently vegetative state. The carrier which initially took over the defense did so with a \$100,000 policy. It then tendered to the carrier who also had a \$100,000 primary policy, albeit with an excess clause, because that carrier also held a true excess policy with coverage limits of \$9 million. Thus, it may have seemed unseemly to the Court that the carrier with \$9,100,000 worth of exposure was seeking to pass the entire cost of defense to the carrier with \$100,000 of exposure.

With regard to the issue of waiver, the *Sport Rock* decision provides some needed clarity to this issue without resort to having to balance the equities. In *Sport Rock* the court found there was no waiver, because the purported excess carrier started out with the case, attempted to tender it, was rebuffed, and thus had no choice but to defend its insured with a reservation on the issue. This the court compared to the conduct of the purported excess carrier in *General Motors* who voluntarily took over the case from the primary carrier.

Allocation of Defense Costs

Having steered clear of the *General Motors* case, the *Sport Rock* court returned to American's claim that it could allocate defense costs based on the fact that it only provided coverage to a portion of the claims in the complaint. The *Sport Rock* court rebuffed such a suggestion based on the well-settled rule that an insurer's "duty to defend is broader than its duty to indemnify" and arises "whenever the allegations of the complaint suggest...a reasonable possibility of coverage." *Sport Rock*, 2009 WL 1290266 at 3 (citing *Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 [2006] and *Firemen's Ins. Co. of Washington, D.C. v. Federal Ins. Co.*, 233 A.D.2d 193 [1 Dept. 1996], lv denied 90 N.Y.2d 803 [1997]). The *Firemen's* court

had specifically held that an insurer is required to pay for defense of all claims, not merely those risks covered in its policy. Thus the *Sport Rock* court concluded that American could not seek to allocate defense costs based on the percentage of claims in the complaint its policy covered. Oddly, the court did not comment on American's seemingly self-serving apportionment to itself of 10 percent.

Split Between Panels

Notwithstanding the straightforward position taken by the court in *Sport Rock*, it is not altogether clear, that it represents the actual position of the First Department. Incredibly, the majority pointedly noted that its decision is at odds with another decision only handed down by the First Department in February 2009, *Fieldston Prop. Owners, Assn. Inc., v. Hermitage Ins. Co. Inc.*, 873 N.Y.S.2d 607 (1st Dept. 2009).¹

As such, the *Sport Rock* decision presents a fascinating, and one can discern, a somewhat impolite disagreement between judges on the same court. The *Sport Rock* majority, at one point in the decision notes, "[s]ince this bench unanimously considers our resolution of the instant appeal to be required by settled law, we have no occasion to respond to *Fieldston's*

Until the Court of Appeals speaks on this subject again, both 'Sport Rock' and 'Fieldston' will nevertheless provide guidance to insurance carriers seeking to shift defense costs to other insurers pursuant to the 'other insurance' provision.

policy arguments." *Sport Rock*, 2009 WL 1290266 at 10. Adding to the drama is a concurring opinion by Justice David Saxe, the only judge who sat on both panels. Justice Saxe tries to smooth over the controversy by pointing out that since the circumstances of the two cases were different, there was "no need to analyze or criticize [*Fieldston's*] reasoning."

Justice Saxe further underlines the nature of the conflict by concluding his concurrence with the statement, "[t]o the extent the majority discusses and disapproves of the reasoning in *Fieldston*, I disagree with the majority opinion." 2009 WL 1290266 at 13. Justice Saxe oddly had no disagreement with the majority's legal reasoning; rather he was expressing his disagreement with the majority's public criticism of their fellow brethren.

In *Fieldston*, the court was faced with two underlying actions, in which the plaintiff had asserted several interference with property claims and a single claim for defamation. Like in *Sport Rock*, the insured had two primary policies, with one being excess by virtue of the "other insurance" provisions. Both policies covered the defamation claim, but only the policy that was excess covered the interference with property claims, which constituted the vast majority of the complaint.

The court in *Fieldston* held that while the primary carrier was obligated to defend with respect to all claims, even the ones it did not provide coverage for, it was entitled to contribution from the excess carrier for all defense costs, except the portion of its defense associated with the defamation claim, the only claim that was covered by both policies. The

court reasoned that the "other insurance" provision, by its own terms, only applied "where two or more insurance policies cover the same risk." *Great Northern v. Mount Vernon Fire Ins. Co.*, 92 N.Y.2d 682, 686-687 (1999). Thus, with respect to the interference with property claims, neither policy was excess to the other, so allocation was required. As such, the *Fieldston* court also ignored the language from *General Motors* that the other insurance clause did not apply to defense costs.

With this aspect of the *Fieldston* decision, the *Sport Rock* court was in perfect agreement. So what was the problem? In coming to its conclusion, the *Fieldston* court for some reason, saw fit to assert that its decision was inconsistent with *Firemen's*, supra, (the foundation upon which the *Sport Rock* decision was based), and moreover, expressly stated that it now "refused to follow...*Firemen's*." *Fieldston*, 873 N.Y.S.2d at 614.

Although the *Sport Rock* majority could have opted to ignore *Fieldston's* repudiation of *Firemen's* and give the impression that the court had repudiated this portion of *Fieldston* sub silentio, it instead expressly repudiated it, moreover, calling for the matter to "be settled by the Court of Appeals..."—taking the matter outside, so to speak. *Sport Rock*, 2009 WL 1290266 at 9.

The *Sport Rock* court disputed the *Fieldston* court's conclusion that the result in *Firemen's* "is not supported by the plain language of the 'other insurance' clause in that case" (*Fieldston*, 873 N.Y.S.2d at 614) and distinguished the two cases relied upon by the *Fieldston* court to support its abandonment of *Firemen's*.

The *Sport Rock* court noted that the *Firemen's* decision was distinguishable from *Fieldston* and thus, there was no need to abandon it, because in *Firemen's*, unlike in *Fieldston*, both policies covered the same risk, therefore the "other insurance" provision was triggered with respect to all the claims.

We suspect that to the extent that the Court of Appeals takes up this issue, it will affirm the vitality of *Sport Rock*, *Fieldston* and *Firemen's*. As such, counsel and claims professionals should not put too much stock in *Fieldston's* repudiation of *Firemen's*. What is perhaps more interesting, is what the Court of Appeals may say about its roundly ignored statement in *General Motors*, that the excess clause in the other insurance provision only applies to indemnity and not defense costs. Until the Court of Appeals speaks on this subject again, both *Sport Rock* and *Fieldston* will nevertheless provide guidance to insurance carriers seeking to shift defense costs to other insurers pursuant to the "other insurance" provision. Readers would do well to take careful notice of the subtle issues of waiver in this area, which create a minefield for the unwary.

1. *Sport Rock* was written by Justice David Friedman and joined by Justices Peter Tom, and John Buckley, with Justices David Saxe and James Catterson concurring. The *Fieldston* decision was written by Justice James McGuire and joined by Justices David Saxe, John Sweeney and Rolando Acosta.