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## **NEW YORK'S FIRST DEPARTMENT REJECTS INSURER'S ATTEMPT TO DISCLAIM COVERAGE ON GROUNDS NOT SPECIFICALLY IDENTIFIED IN THE INITIAL DISCLAIMER**

*By August J. Matteis, Jr. and David N. Webster II*

Policyholders recently achieved a major victory in *Estee Lauder Inc. v. OneBeacon Ins. Group, LLC*, No. 602379/05, 2009 WL 398879 (1st Dep't Feb. 19, 2009), which significantly raises the bar for what an insurer is required to do in order to disclaim coverage under comprehensive general liability ("CGL") policies. As described more fully below, the First Department held that an insurer must promptly state in its notice of disclaimer the specific grounds on which it intends to disclaim coverage to the extent that the insurer knows of such grounds at the time it provides the disclaimer. Indeed, the Court held that it was insufficient for the insurer to attempt to disclaim coverage on alternative grounds where the initial notice of disclaimer merely purported to reserve the insurer's rights to disclaim coverage on alternative grounds later.

In two separate lawsuits, cosmetics manufacturer Estee Lauder Inc. ("Estee Lauder") was named as one of several potentially liable parties for cleanup costs at two New York landfills, Blydenburgh landfill in Hauppauge, NY and Huntington/East Northport landfill in Huntington, NY. OneBeacon Insurance Group, LLC ("OneBeacon"), which issued a primary CGL policy to Estee Lauder, disclaimed coverage for both lawsuits stating it was unable to confirm the existence and terms of the policy at issue. Estee Lauder was unable to locate the missing policy. Estee Lauder did, however, produce a renewal policy issued to it by OneBeacon's predecessor, which noted in its declarations page that the new policy was a reissuance of the disputed policy. Estee Lauder also produced certificates of insurance relating to the disputed policy. In its disclaimer, OneBeacon purported to reserve its right to disclaim on alternative grounds in the future.

At a later date, OneBeacon asserted that it was also disclaiming coverage because Estee Lauder had given OneBeacon untimely notice of the pending lawsuits against it. The First

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Department held that since OneBeacon was aware of the late because it was not specifically asserted in the initial disclaimer. The Court reasoned that imposing the duty on the insurer to provide an early disclaimer based on late notice of an occurrence or claim, even where the insurer claims there is no policy, enables the policyholder to make a prompt and fully informed decision as to whether to pursue efforts to establish the existence of the policy or rather to allocate its resources toward investigating the underlying claim and preparing a defense.

In addition to its ruling regarding disclaimer, the court also issued a favorable decision regarding missing policies. Indeed, the Court held that the renewal policy, which specifically referred to the missing policy, and the certificates of insurance relating to the missing policy, were sufficient to establish the terms and time period of the missing policy. Finally, the Court rejected OneBeacon's contention that the missing policy would have contained a pollution exclusion. The renewal policy did not contain such an exclusion and OneBeacon's expert testimony that the missing policy would have contained a pollution exclusion was unconvincing according to the ruling of the Court.

Accordingly, this decision makes it harder for insurers to disclaim coverage and easier for policyholders to establish coverage under missing policies. Because there are no dissenting opinions, the insurer would have to seek leave in order to appeal this decision to the New York Court of Appeals.