

# Partner Jason Taylor and Senior Associate Danielle Kegley Successful in Appeal of Summary Disposition on Priority of Coverage Dispute in the Michigan Court of Appeals

BY: Jason Taylor, Danielle K. Kegley

In this appeal brought before the Michigan Court of Appeals, the appellate court ruled in favor of Traub Lieberman's insurance carrier client (the "Carrier" or "Client"), affirming an award of summary disposition in favor of the Carrier in a coverage lawsuit. The coverage lawsuit involved a priority dispute between the Carrier and another insurer over which company's policy had responsibility to cover the defense of their mutual insured, a heating and cooling contractor (the "Insured") in an underlying lawsuit alleging carbon monoxide poisoning. The Carrier issued a contractor's pollution liability policy and the other insurer issued a commercial general liability policy to the Insurer. Both the Carrier and the other insurer filed cross-motions for summary disposition in the trial court on the priority of coverage issue. The trial court granted the Client's motion, holding that the CGL carrier was the primary insurer based on the language in the policies' "other insurance" clauses. The trial court rejected the CGL carrier's argument to apply the "total policy insuring intent" or "closest to the risk" tests—tests which Michigan courts have not adopted. Specifically, the court rejected the CGL carrier's argument that the Client's contractor's pollution liability policy was more specifically tailored to the loss in the underlying lawsuit. The trial court also rejected CGL carrier's alternative argument that the "other insurance" clauses in the policies were irreconcilable, requiring a pro rata allocation based on the respective limits of the policies.

The appellate court, like the trial court, refused to apply the "total policy insuring intent" or "closest to the risk" tests that the CGL carrier put forth for resolving the priority issue. Rather, the appellate court recognized Michigan law requires application of the "other insurance" clauses in the policies to resolve the priority issue. The appellate court then found that the "other insurance" clauses in the Client and CGL Policies are reconcilable, and that the Client's "other insurance" clause clearly rendered the Client's Policy excess, and the "other insurance" clause of the CGL policy rendered it primary. The appellate court further rejected CGL carrier's alternative argument that the "other insurance" clauses in the policies conflicted, rejecting the CGL carrier's attempt to allocate the defense costs in the underlying lawsuit on a pro rata basis. Ultimately, the appellate court affirmed the trial court's grant of summary disposition on the priority of coverage issue in favor of the firm's Client, and remanded the case back to the trial court for evidentiary hearing on damages/final judgment. Application for leave to appeal to the appellate court's ruling to the Michigan Supreme Court was denied.