



## Alerts

### Excess D&O Policy Not Triggered by Vizio's Smart TV Litigation Claim

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*Insights for Insurers: Cyber Coverage*

An excess D&O insurer had no obligation to contribute to Vizio's settlement with its primary general liability insurer for liabilities arising from the Smart TV Litigation, a California federal district court has held. See *Vizio, Inc. v. Navigators Insurance Company*, No. 2:20-cv-06864-ODW, slip op. (C.D. Cal. May 4, 2021). Vizio was seeking coverage for liabilities incurred in connection with the so-called Smart TV Litigation, a multidistrict litigation in which consumers alleged that Vizio improperly disseminated and used their personal information and misled them about acquiring Vizio products. Vizio had settled its Smart TV Litigation coverage claim against its general liability insurer for an undisclosed amount. It then alleged that its primary D&O insurer, Navigators, wrongfully denied coverage for the claim and that its excess D&O insurer, Arch, failed to timely accept or deny the claim. Vizio asserted claims against Arch for breach of contract for failure to provide a defense or indemnity, bad faith, and equitable contribution. Arch moved to dismiss.

The excess Arch policy provided that Arch's obligations were not triggered until Vizio exhausted the policy's underlying limit. The court ruled that Vizio's breach of contract claim against Arch failed because there were no allegations demonstrating exhaustion of the underlying limit. "Instead," said the court, "Vizio vaguely alleges that 'the amounts paid as Settlement Sum and Defense Costs by [the primary general liability insurer] and Vizio exhausted the Underlying Limit.'" (emphasis supplied by the court). Consequently, "it is impossible to discern how much the insured, Vizio contributed to the costs of defense and ... any payments made by [the primary general liability insurer] would not serve to exhaust the Underlying Limits...." The court noted that the primary general liability insurer "is not an Underlying Insurer, the Insured, or a DIC Insurer." In addition, Vizio's assertion that Arch breached the contract by not timely accepting or denying the claim "falls flat because where, as here, there was no duty to defend, [Arch's] silence was not wrongful of a breach of the policy."

Vizio's claims for breach of the implied covenant of good faith and fair dealing also failed because "a bad faith claim cannot be maintained unless policy benefits are due." Finally, the court dismissed Vizio's equitable contribution claim because Arch had no obligation to contribute to Vizio's settlement with its general liability insurer. The court stated: "Here, it is clear that, as a matter of law, Vizio cannot bring a claim for equitable contribution against Arch because Arch (excess insurer) and [the primary general liability insurer] do not share the

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same level of coverage and Vizio does not point to an agreement that contracts around that default rule."