August 10, 2015

Insurer Has Duty To Defend Lawsuit Seeking Recovery for Construction Contractor's Negligence

In July, the U.S. District Court for the Eastern District of Virginia ruled that an insurance company had a duty to defend a lawsuit alleging that an insured contractor's defective work caused property damage. While the Court did not address whether the insurer would have to pay for the damages arising from the contractor's allegedly defective work, the ruling is significant.

Most construction companies maintain commercial general liability insurance in case they become liable to pay another person for bodily injury or property damage losses. Often, insurers are able to escape defending or indemnifying claims because of the particular language of the CGL policy – it covers only damages arising from an "occurrence" that takes place in the covered territory and policy period. An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Faulty workmanship, insurers contend, cannot be an "accident" because the contractor must have known or intended that the work was not up to standards. In other words, the outcome could have been prevented through proper workmanship.

Also in July, in *Builders Mut. Ins. Co. v. ARC Construction, LLC*, a Virginia court rejected an insurer's argument that allegations of defective work in a lawsuit should be summarily denied a defense under a contractor's CGL policy. The lawsuit challenged by the insurer alleged that the contractor had damaged one-half of a duplex while performing extensive renovations on the duplex's other half. The lawsuit contained descriptions of lead contamination, structural damage to the common wall, flooring and wall cracks, and other property damage resulting from the contractor's negligence.

The insurer defended the lawsuit under a reservation of its rights to later deny coverage. The insurer then asked the court to find that it had no duty to defend the case because the builder's actions were not an "occurrence." The court, however, found that the insurer could not prove that there was no possibility that a claim could be within the insuring provisions of the policy or that an exclusion to coverage applied.

In short order, the Court found that the damage alleged could constitute an "occurrence." In doing so, the Court relied on a prior case finding that the definition of "occurrence" is "broad and inclusive" and provides coverage for any "event that takes place without one's foresight or

expectation." In so concluding, the Court also quickly rejected the argument that the exclusion for "intentional or expected" damage also did not apply.

Finally, the Court also dismissed the insurer's argument that exclusions j(5) and j(6) of the policy should apply. These exclusions limit coverage for damages to the "particular part of real property" on which a contractor is working. The Court concluded that the phrase "the particular part of real property" should not be construed to cover the non-defective property of the duplex's other half on which the contractor was not performing work.

Because the insurer could not prove that there was absolutely no possibility of coverage under the policy, the Court found that it must continue to provide the contractor with a defense to the lawsuit. The duty to defend, as the Court reminded, is much broader than the obligation to provide indemnity.

Construction companies should consider reviewing their CGL policies and bringing lawsuits to the attention of their insurers for potential coverage. While a policy may not provide ultimate indemnity of a particular judgment or outcome, it is possible that some claims within the lawsuit may give rise to the insurer's duty to provide the company with a legal defense of the lawsuit. Given the cost and challenges of lawsuits, obtaining a defense is a substantial policy benefit that insureds should seek to invoke when possible.

The case is *Builders Mut. Ins. Co. v. ARC Construction, LLC, No. 1:115cv406, July 2, 2015 (E.D. Va.)*.

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