

Construction Defect Cases – Coverage Issues for Insurance Professionals and Coverage Counsel

The following article is meant to assist insurance professionals and coverage counsel hired by the insurer in addressing construction defect claims under Commercial General Liability (“CGL”) Policies.

This firm has come across many issues in the area of insurance coverage related to construction defect cases. Allegations could arise out of defects in the construction of the property, deficient work performed under a roofing contract, cracks and product failures developed in stucco and molding as a result of poor stucco installation, etc.

The insurance professional or coverage counsel should address several questions in analyzing construction defect claims, some of which could be the following: What Counts are advanced against the Insured? Breach of contract? Violation of the Consumer Fraud Act in a specific jurisdiction? Breach of the implied covenant of good faith and fair dealing? Negligence? Fraud? Negligent Hiring, Retention, Training and Supervision? In short, the insurance professional should analyze whether there is coverage for some or all of the counts in an action or complaint against the insured.

It is critical to review whether the address where the construction defect occurred is covered in the policy. Review what premises are covered and also check schedules in endorsements, which may limit coverage to a designated premises, project or operation.

Consider whether the Insuring Agreement obligates the insurance company to make payment that the insured is legally obligated to pay as damages for bodily injury or property damage and defend suit seeking such damages. Determine what type of damages claimants are seeking – in these cases, it is mainly for property damage, therefore involves the possibility of coverage for property damage alone.

The insurance professional should consider what classifies as an occurrence. Oftentimes, insurance applies to "property damage" caused by an "occurrence", which has been defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Consider whether courts in your jurisdiction consider damage caused by negligent/faulty work as an accident for purposes of the definition of occurrence under the policy.

What other questions should you ask? Are any policy conditions applicable? For example, a condition might state that if other valid and collectible insurance is available to the insured for a loss covered, the insurer's obligations could be limited, possibly making the instant insurance policy excess over other primary insurance available to the Insured for the liability for damages at issue. This may require an investigation into other policies available and afforded to the insured where the insured may have been named as an additional insured. Where another insurer is providing a defense, the insurer for which coverage is being considered may have no obligation to do so, which may greatly reduce the insurer's exposure.

Determine if there are any policy exclusions. For example, a New Residential Work Exclusion precluding coverage for property damage arising out of operations and the Insured's

work related to new construction of residential units, remodeling or conversion of existing buildings, or on property owned or maintained on behalf of a residential homeowners' association. Another example is an Exterior Insulation and Finish Systems Exclusion. Review the Complaint to see what Plaintiff(s) are alleging. Do they mention an exterior insulation and finish system provided by the Insured was negligently applied? The Insurer may wish to limit or deny coverage under the Exterior Insulation and Finish Systems Exclusion if it is determined that some or all of the subject damages arose out of an "exterior insulation and finish system", or the Insured's work with respect to any exterior component, fixture or feature of any structure on which an "exterior insulation and finish system" is used.

Another exclusion could preclude coverage to "property damage" to "your work" arising out of it or any part of it and included in the "products- completed operations hazard". Consider whether the damage is limited to, for example, the stucco itself. If the damage extends beyond the stucco and goes beyond the definition of "your work", coverage may be available for such damages.

Other exclusions to be sure not to overlook are punitive and exemplary damages exclusions. Thus, to the extent a claimant seeks such damages, which could be seen, for example, through a Consumer Fraud Act claim, it must be assessed whether there would be any obligation to defend or indemnify the Insured in connection with such damages sought.

Very importantly, insurance professionals, including coverage counsel hired by the insurer, should know that a disclaimer or denial of coverage must be sent to the insured "as soon as it is reasonably possible" after the insurer learns of grounds for disclaiming – this may vary state by state so it is important to know your states laws in relation to disclaiming and denying coverage as unreasonably delay may have implications. Unreasonable delays in disclaiming coverage or denying coverage may be grounds for an insured to allege waiver of a denial of coverage or estoppel against the insurer.

Always keep in mind that the preferable means of deciding any question of coverage is the filing of a declaratory judgment action and be sure to consider filing a declaratory judgment action, in order to have the court rule that there is no obligation to defend or indemnify the insured for damages in reference to the related matter.

This is a brief overview of common issues and pitfalls to consider in analyzing construction defect matters for purposes of a coverage analysis under a CGL policy. Every case is different, and counsel should be consulted for further analysis on pending actions.

Should you have any further questions, one of our attorneys specializing in this field can speak with you today about our services. Contact Thomas Paschos & Associates, P.C. for more information. We can be reached at [856-354-1900](tel:856-354-1900) or 267-205-2444. You can also contact Thomas Paschos, Esq. at TPaschos@pascholaw.com.