A Construction Defect Insurance Carrier Need Only Demonstrate That Another Insurance Carrier's Policy May Potentially Cover The Claim In Order To Recover Equitable Contribution To A Settlement

Sunday, August 25, 2013

A California Appellate Court recently clarified the burden of proof for an insurance company seeking contribution from another insurance company in settlement of a construction defect action. When a company involved in construction is sued for allegedly causing property damage to the building or structure it built (i.e. a construction defect), the company typically turns to its commercial general liability insurance policy. Depending on the nature of the defect claim the construction company may have more than one policy that could potentially provide coverage. Different insurance carriers may respond to their insured’s tender in different ways. When one carrier agrees to defend and indemnify its insured from a claim potentially covered by another carrier, but the second carrier refuses to cover, the first might settle the claim and then seek a court ruling that the second provide “equitable contribution” to the settlement amount paid. In that situation, what does the settling carrier have to show? That the claim was absolutely and certainly within the coverage of the second insurance policy?

The case concerned an apartment complex that had been converted to condominiums, and the condominium owners’ Homeowners Association sued the developer for various construction defects. The developer had two insurance policies governing different time periods that potentially provided coverage. One carrier accepted the developer’s tender, but the second did not and instead reserved its rights to argue that the claim was not covered by its policy. The first carrier went on to settle the matter, and then sued the second for equitable contribution. The question, of course, was whether the second carrier’s policy really provided coverage. What did the first carrier have to prove? The Appellate Court held that all that the settling insurer need do is demonstrate that there is “potential coverage”, but does “not have to prove actual coverage.” Once the settling carrier makes this prima facie showing of potential coverage, the burden shifts to the non-settling carrier against whom equitable contribution is sought to prove that there was no coverage. *Axis Surplus Ins. Co. v. Glencoe Ins. Ltd.* (2012) 204 Cal.App.4th 1214.

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