

OREGON LAW UPDATE

Insurer's Duty to Defend in Construction Defect Case

From the desk of Bruce Gilbert: How does a court determine whether an insurer has a duty to defend its insured?

Claims Pointer: The court will only look to the language in two documents to determine an insurer's duty to defend: (1) the original complaint in the underlying action; and (2) the insurance policy. The duty to defend arises if the complaint provides *any basis* for which the insurer provides coverage. This is true even if some of the conduct alleged in the complaint falls outside the policy's coverage. Any ambiguity as to coverage is resolved in favor of the insured in this context.

case in point...

Seneca Ins. Co. v. James River Ins. Co., 2014 WL 3547376 (D. Or. July 17, 2014).

This case involved a dispute over the defective construction of a 60-unit condominium complex located in Seaside, Oregon. S.D. Deacon Corp. ("Deacon") contracted with the Sand & Sea Association, comprised of condominium owners, to reconstruct and renovate various portions of the Sand & Sea condominiums, including the renovation of the "curtain wall assemblies." Deacon subcontracted with Superwall Design, LLP ("Superwall") to work on the curtain wall renovation (the "Project"). Subsequently, the Sand & Sea Association notified Deacon of property damage and construction defect issues allegedly arising out of the Project. After investigating the allegations, Deacon concluded that the property damage was the result of construction defects, inadequate or inappropriate usage of materials, violations of the applicable state and local building codes, and violations of the relevant industry standards, arising from, or relating to the work performed by Superwall as part of the Project.

Deacon claimed it incurred costs exceeding \$1.78 million to repair the damage to the Sand & Sea Condominiums attributed to Superwall's faulty workmanship. Deacon put Superwall on notice of the construction defect claims in a letter in late January 2012. In a June 2012 letter to James River Insurance Company ("James River"), Deacon tendered its claim as additional insured on Superwall's insurance policy issued in part by James River. Deacon filed the underlying action against Superwall and provided James River with a copy of the complaint. At certain points during the Project, Superwall was insured under policies with both plaintiff insurer Seneca Insurance Company ("Seneca") and James River. Seneca initially agreed to defend Superwall, in the underlying

lawsuit. Seneca subsequently filed suit against James River, arguing: (1) James River had a duty to defend Superwall; and (2) James River was required to pay half of Seneca's costs in defending Superwall in the underlying action. The case was before the court on Seneca's motion for summary judgment regarding James River's duty to defend the insured in the underlying action.

The court began its analysis with an insurer's duty to defend. The general standards to determine whether an insurer has a duty to defend its insured against a particular claim depends on two documents: the complaint and the insurance policy. *Ledford v. Gutoski*, 319 Or. 397, 399-400 (1994). The court looks to the facts alleged in the complaint to determine whether they provide a basis for recovery that could be covered by the insurance policy. The duty to defend arises if the complaint provides any basis for which the insurer provides coverage. Even if some of the conduct alleged in the complaint falls outside the policy's coverage, the insurer will nevertheless have a duty to defend its insured. Any ambiguity as to coverage should be resolved in favor of the insured in this context.

Here, looking at the language of the insured's policy (the "Policy"), the court found that the Policy would pay for property damage: (1) that is caused by an "occurrence"; (2) occurs during the Policy period; and (3) was unknown to the insured prior to the Policy period. By contrast, the Policy excludes, among other things, property damage which begins prior to the inception date of the Policy, even though such damage may be "continuous, progressive, cumulative, changing or evolving," whether or not the damage is known to the insured.

James River argued that the property damage occurred prior to the inception of the Policy, and therefore the damage was excluded under the



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Policy. James River based its contention on two theories. First, Deacon's pleading showed both that Superwall began work on the Project, and the property damage occurred prior to the effective date of the Policy. Alternatively, James River argued that it was undisputed that "rain fell" and "air moved" in Seaside, Oregon at some point between when Superwall began work on the property and the inception of the Policy. Accordingly, "[t]he laws of nature dictate that at least some alleged damage in the form of air and water intrusion occurred before the effective date of" the policy.

The court rejected both of James River's arguments. First, based on the allegations in the complaint, it was possible that the alleged damage occurred during the Policy period. The court advised that if evidence at trial ultimately showed that the damage did in fact occur prior to the Policy's inception, then James River would be relieved of the duty to *indemnify* Superwall; however, nothing in Deacon's original complaint shows otherwise. The duty to indemnify is independent of the duty to defend. *Ledford*, 319 Or. at 403. Further, the court found James River's arguments regarding the weather conditions to be unpersuasive. Whether or not the weather conditions allegations were true, those facts were not alleged in the complaint and did not appear in the Policy, thus could not be considered for purposes of determining the duty to defend. In determining whether James River had the duty to *indemnify*, the court advised, weather conditions may be helpful to resolve the indemnity issue. However, weather conditions are "useless" to the duty to defend determination. Nor does the fact that "rain fell" and "air moved" between the time Superwall began work on the Project and the Policy's issuance reasonably lead to a conclusion that at least some alleged damage occurred prior to the Policy's issuance. As a result, the court concluded that James River had a duty to defend Superwall, and that duty commenced upon the filing of the underlying action. Accordingly, Seneca's motion for summary judgment was granted in part and reserved in part.



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