

OREGON LAW UPDATE

Duty to Defend is Triggered When the Complaint is Silent on the Timing of Damages

case in point ...

From the Desk of Jack Levy: This case holds that the insurer is limited to looking at the complaint and the policy – the “eight corners” – when determining the duty to defend. This holding, however, is difficult to reconcile with the holding in *Fred Shearer & Sons, Inc. v. Gemini Ins. Co.*, 237 Or App 468 (2010), where insurers were told to look for extrinsic evidence - evidence outside the eight corners - to determine whether a party qualifies as an insured under the policy.

Claims Pointer: As Bresee applies the eight corner rule to determine whether coverage is available for conduct alleged in a complaint, and Fred Shearer requires examination of extrinsic evidence to determine a party’s status as an insured, careful attention is necessary over how these holdings are applied to the facts of a given case.

Bresee Homes, Inc. v. Farmers Insurance Exchange, in the Supreme Court of the State of Oregon, 353 Or 112, --- P.3d --- (December 31, 2012).

The Bresee case involved the general contractor’s, Bresee Homes’, insurance coverage lawsuit against Farmers Insurance Exchange in response to Farmers’ refusal to defend and indemnify Bresee in a construction defect case. Farmers’ refusal was based on a “products - completed operations hazard” (Completed Operations) exclusion in Farmers’ policy. The Completed Operations exclusion stated that “the insurance does not apply to property damage included within the ‘products - completed operations hazard.’” The Farmers policy defined the “products - completed operations hazard” in the same way that the term is defined in the standard form general liability insurance policy, the Insurance Services Organization (ISO) form CG 00 01. The definition of Completed Operations sets out several factual circumstances under which the policyholder’s work is deemed completed, including when all of the work called for in the contract has been completed or when the work has been put to its intended use. However, the definition also contains an exception for “[w]ork that has not yet been completed.”

The underlying construction defect complaint by the homeowners against Bresee did not state whether the claimed damages occurred before or after the completion of Bresee’s work. Nonetheless, in the coverage case the

trial court held there was no coverage under Farmers’ policy because the Completed Operations exclusion applied. The trial court allowed Farmers to introduce extrinsic evidence to prove that the house was completed six years before the construction defect lawsuit was filed. The Court of Appeals affirmed the trial court, relying on this extrinsic evidence as well as the fact that Bresee had presented no contradictory evidence that the claimed damages occurred before Bresee had completed its work.

The Oregon Supreme Court reversed the Court of Appeals, holding that only the facts alleged in the underlying complaint and the terms of Farmers’ policy – the eight corners – governed Farmers’ duty to provide a defense. It held that development of extrinsic evidence in the coverage action was inappropriate. Noting that the policy’s Completed Operations definition excepted “[w]ork that has not been completed,” the Supreme Court held that Farmers owed Bresee a defense since the underlying construction defect complaint did not state whether the claimed damages occurred before or after the completion of Bresee’s work: “From all that appears from a reading of the complaint, the described property damage occurred, or could have occurred, when Bresee’s work was neither completed nor ‘deemed complete’ under the ‘products - completed operations hazard,’ as defined in the policy.”



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