

OREGON LAW UPDATE

Broad Pleading Triggers Duty to Defend Additional Insured in Construction Defect Case Under “Ongoing Operations” Endorsement

From the desk of Jack Levy: Why does a complaint that makes no reference to the timing of damage and no mention of an insured’s/subcontractor’s identity trigger its insurer’s duty to defend a developer under an “ongoing operations” additional insurance endorsement?

case in point...

Claims Pointer: In the West Hills case, which involved one of the many Arbor Homes projects being litigated in the Portland metropolitan area, the Court of Appeals held that the developer qualified as an additional insured under a subcontractor’s insurance policy in connection with a lawsuit over garden-variety water intrusion issues, even though the additional insurance endorsement in the policy was limited to liability arising out of the subcontractor’s “ongoing operations.” In this game-changing case, the court held that the endorsement applied because the complaint was silent about the timing of damages. Further, it didn’t matter that the complaint did not mention the subcontractor by name, or specifically allege defects in the subcontractor’s work. The insurer is required to look at extrinsic evidence to determine the developer’s status as an additional insured. Threaded together, the extrinsic evidence and the facts that were alleged in the complaint could potentially impose liability on the developer arising out of the subcontractor’s work. The takeaway from this case is that insurers and policy holders need to carefully consider the complaint, the available extrinsic evidence, and the language of the endorsement to determine whether a developer (or any other upstream party) qualifies as an additional insured.

West Hills Development Co. v. Chartis Claims, 273 Or App 155 (August 19, 2015)

West Hills Development Company (West Hills) was the developer/general contractor for the Arbor Terrace townhomes. West Hills hired subcontractor L&T Enterprises (“L&T”) to install porch columns. L&T was insured by Oregon Automobile Insurance Company (Oregon Auto). The Oregon Auto policy was amended to include West Hills as an “additional insured” “but only with respect to liability arising out of [L&T’s] ongoing operations performed for that insured.”

After construction was completed, the Arbor Terrace Homeowner’s Association (the HOA) filed a complaint against West Hills for construction defects resulting in water intrusion property damages. The complaint alleged that West Hills was negligent in overseeing, supervising, and directing subcontractors. The complaint did not specifically allege defects in the porch column construction, but it did identify generic deficiencies in the construction such as insufficient weatherproofing. The complaint also alleged that in order to repair the defects, the HOA would have to weatherproof the columns, among other things.

West Hills sent a tender letter to Oregon Auto requesting a defense to the HOA’s suit for damage caused by L&T. In the letter, West Hills stated that the “Complaint implicates work performed by your insured.” Oregon Auto refused to defend

West Hills - as most insurers do in circumstances like these - because Oregon Auto perceived the allegations in the complaint as involving water intrusion damages that postdated L&T’s “ongoing operations.”

West Hills subsequently filed a coverage action against Oregon Auto regarding its duty to defend. The trial court held that Oregon Auto had a duty to defend West Hills because the HOA’s complaint raised the possibility that L&T was negligent. Oregon Auto appealed.

The Oregon Court of Appeals upheld the trial court’s finding of coverage. The Court of Appeals explained that an insurer has a duty to defend when allegations in a complaint could give rise to a claim covered by the policy. The Court relied on West Hills’ tender letter to Oregon Auto in which West Hills said that the complaint involved L&T’s work. Oregon Auto argued that the letter was self-serving because if tender letters could be the basis for coverage, the statement of a potential insured could create coverage where none would otherwise exist. The Court put aside that argument, stating that the tender letter advised Oregon Auto of its potential duty to defend, and reminding Oregon Auto that it has a duty to examine extrinsic evidence (facts outside the complaint) to determine whether West Hills qualifies as an insured. The Court held that the complaint’s reference to defects “in the building envelope and other components of each building”



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and allegations regarding a scope of repair, which included repairing columns, was enough to trigger the duty to defend.

Oregon Auto also argued that West Hills was only insured for purposes of lawsuits having to do with damage occurring during L&T’s work. The Court rejected that argument because the complaint was silent about the timing of damages. It held that silence on the issue was enough to create the possibility that damage occurred while L&T was working. Silence about the timing of work, the court said, may also help plaintiffs trigger a lot of coverage:

“Like any plaintiffs, [the HOA] may have had no motivation to be specific or to plead matters significant to insurance coverage, especially when pleading broadly may help them to implicate policy years of multiple insurers.”

In light of the requirement that extrinsic evidence be examined to determine one’s status as an additional insured, and the fact that not all additional insurance endorsements are written the same, policyholders and insurers should carefully evaluate the complaint and available extrinsic evidence against the language of the specific endorsement to determine whether and to what extent a developer (or any other upstream party) qualifies as an additional insured. For example, some additional insurance endorsements apply only with respect to the negligence of the named insured, or only to the extent required by the terms of a written contract. The additional insurance exposure should be clearly understood before jumping in or opting out.



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