

OREGON CASE UPDATE

The Silent Complaint: Does Subcontractor's Insurer have Duty to Defend Where Complaint Fails to Allege Subcontractor's Negligence?

case in point...

From the Desk of Ryan J. McLellan: Oregon law provides that a subcontractor's insurer may have a duty to defend a general contractor and owner against damages arising out of the subcontractor's own negligence. Because it is common for an injured employee to receive workers' compensation benefits and therefore omit his own employer from a complaint, it is not always clear from the complaint whether damages were caused by the subcontractor's negligence. So when does the duty to defend trigger in such a circumstance? Read on to see how Oregon courts handle this issue.

Claims Pointer: Pursuant to Oregon's anti-indemnity statute for construction contracts, an insurer is obligated to provide a defense to its additional insureds only when the additional insureds' involvement in the case arose out of the negligence of the named insured. In this coverage case involving a construction site injury, a federal Oregon District Court held that an insurer's duty to defend its additional insureds can be triggered even though the complaint contains no allegations of negligence against the named insured. The court reasoned that when the complaint merely "implies the negligence" of the named insured, the insurer will have a duty to defend its additional insured. When deciding whether to accept the defense of additional insured in construction site cases (or when deciding to press for a defense as an additional insured), make sure to review the allegations of the complaint broadly and with the understanding that the complaint need only to imply the negligence of the named insured for the duty to defend to arise.

Homeland Insurance Co. of New York v. AAM, Inc., et al., 2016 WL 2841944 (D Or May 13, 2016)

Del Monte Foods, Inc. ("Del Monte"), hired CentiMark Corporation ("CentiMark") to perform repairs to Del Monte's warehouse. CentiMark subcontracted part of the project to AAM, Inc. ("AAM"), and the subcontract required AAM to add CentiMark and Del Monte as additional insureds to its commercial liability policy with Homeland Insurance.

While working on the project, an AAM employee was injured as he fell through the warehouse roof and landed on the ground approximately forty feet below. The employee filed a personal injury lawsuit against CentiMark and Del Monte. As is typical in job site injury cases, AAM was not named as a defendant because they were

protected by the exclusive remedy of the workers compensation system. As such, there were no allegations of fault against AAM included in the Complaint. CentiMark and Del Monte tendered the underlying suit to Homeland, asserting they were entitled to a defense as additional insureds. Although Homeland agreed to defend CentiMark and Del Monte subject to a full reservation of rights, it filed this declaratory action to resolve and clarify its duty to defend.

In analyzing the parties' arguments, the court first confirmed that pursuant to ORS 30.140, Oregon's anti-indemnity statute for construction contracts, Homeland was obligated to provide a defense to CentiMark and Del Monte to the extent that CentiMark and Del Monte's involvement in the lawsuit was caused by AAM's negligence.

Homeland then argued that because its



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duty to defend should be determined solely by analyzing the insurance policy and the complaint, it owed no defense to CentiMark or Del Monte. Homeland argued that because the complaint contained no allegations of AAM's negligence, CentiMark and Del Monte's involvement in the lawsuit could not, as a matter of law, have arisen from AAM's negligence and therefore Homeland had no obligation to provide them a defense.

The court disagreed, citing to some recent cases which allow the courts to look beyond merely the insurance policy and complaint when determining whether a duty to defend exists under these circumstances. The court held that although the complaint did not allege that AAM was negligent, the allegations of the complaint implied AAM's negligence. Because the complaint "implied negligence by the employer," the allegations were sufficient to require Homeland to provide a defense to CentiMark and Del Monte.

The court also briefly turned to the issue of whether Homeland had a duty to indemnify CentiMark and Del Monte. The court held that while the duty to defend is triggered by the bare allegations of the complaint, the duty to indemnify is established by proof of actual facts demonstrating a right to recover. The court noted the potential liability of AAM for the injured employee's injury was fact-based, and the underlying suit was still pending. Thus, the court determined summary judgment was inappropriate and deferred on the issue of indemnity.

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