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2016 Insurance Coverage Litigation Year In Review

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Courts throughout the United States handed down a number of important insurance coverage decisions for policyholders in 2016. This article briefly summarizes a few of the key insurance coverage cases involving the application of the concurrent cause doctrine, coverage for claims against insureds arising out of the faulty workmanship of subcontractors under the "subcontractor exception" to the "your work" exclusion in commercial general liability (CGL) policies, whether intentional acts can be considered an "occurrence" under CGL policies, whether attorneys' fees incurred in pursuing coverage in California can be considered in determining the ratio between compensatory and punitive damages, and Wyoming's adoption of the notice-prejudice rule.


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Efficient Proximate Cause v. Concurrent Cause Doctrine

In Sebo v. American Home Assurance Co., the Florida Supreme Court addressed the issue of whether the efficient proximate cause doctrine or the concurrent cause doctrine should apply in a case where two or more perils converge to lead to one loss and one of the perils is excluded.[1] Sebo involved a claim under an all risk property insurance policy for damage to the insured's home caused by wind, rain, Hurricane Wilma and construction defect. The insurer denied coverage for the majority of the claim based on an exclusion for faulty construction. The insured obtained a jury verdict and judgment in his favor and the appellate court reversed. The Florida Supreme Court found that

there is no reasonable way to distinguish the proximate cause of Sebo's property loss — the rain and construction defects acted in concert to create the destruction of Sebo's home. As such, it would not be feasible to apply the EPC doctrine because no efficient cause can be determined.[2]

The court further found that the insurer "explicitly wrote other sections of Sebo's policy to avoid applying the [concurrent cause doctrine]. Because [the insurer] did not explicitly avoid applying the [concurrent cause doctrine], we find that the plain language of the policy does not preclude recovery in this case."[3] As a result, the court held that "when independent perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurring cause doctrine."[4]

Coverage for Faulty Workmanship of Subcontractors Under CGL Policies

There were two notable construction defect insurance coverage opinions in 2016. The Supreme Courts of New Jersey and Iowa addressed, among other things, whether claims against an insured based on faulty workmanship by the insured's subcontractors was an "accident" constituting an "occurrence" under a CGL policy based on the 1986 Insurance Services Offices Inc. form.

In Cypress Point Condominium Ass'n v. Adria Towers LLC, a condominium association sued the developer/general contractor for damages allegedly arising out of the subcontractors' faulty workmanship and the developer's CGL policy seeking a declaration that the claims against the developer were covered under the insurance policy.[5] The insurers denied coverage, claiming, among other things, that "a subcontractor's faulty workmanship does not have the fortuity element required for the faulty workmanship to constitute an 'accident,' and is therefore not an 'occurrence' under the terms of the policies."[6] The trial court agreed, finding that "faulty workmanship does not constitute an 'occurrence' and that the consequential damages caused therefrom were not 'property damage' under the terms of the policies because the damage arose entirely from faulty work performed by or on behalf of the developer." The appellate division reversed, holding that "unintended and unexpected consequential damages [to the common areas and residential units] caused by the subcontractors' defective work constitute 'property damage' and an 'occurrence' under the [CGL] polic[ies]."[7] The New Jersey Supreme Court affirmed, holding that "the consequential damages caused by the subcontractors' faulty workmanship constitute 'property damage,' and the event resulting in that damage — water from rain flowing into the interior of the property due to the subcontractors' faulty workmanship — is an 'occurrence' under the plain language of the CGL policies at issue here." In so holding, the court focused, in part, on the "subcontractor exception" in the 1986 ISO form policies at issue in the lawsuit, which "'narrow[s] the ['your work'] exclusion by expressly declaring that it does not apply 'if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.'" [8]

In National Surety Corp. v. Westlake Investments LLC, the Iowa Supreme Court decided two issues in connection with a construction defect claim under a CGL insurance policy: (1) whether an accident that constitutes an occurrence under a commercial general liability insurance policy is judged from the standpoint of the insured and (2) whether damages caused by a subcontractors' defective workmanship may constitute an occurrence under a CGL policy based on the 1986 ISO form.[9] The insureds, developers and a general contractor of an apartment complex, were sued by the purchaser of the apartment complex for damages arising out of construction defects. The insureds settled with Westlake, the purchaser of the apartment complex, and with their primary layer insurer and assigned their rights against the excess layer insurer to Westlake. The excess insurer, National Surety, filed a declaratory relief lawsuit seeking a declaration that it had no duty to pay any portion of the judgment because "property damage caused by defective workmanship does not constitute an accident or an occurrence under a CGL insurance policy." [10] The jury found in favor of Westlake and the Court of Appeal affirmed. The Iowa Supreme Court held: "Whether an event amounts to an accident that constitutes an occurrence triggering coverage under a modern standard-form CGL policy turns on whether the event itself and the resulting harm were both 'expected or intended from the standpoint of the insured.'"[11] The court then turned to the question of whether a subcontractor's defective workmanship may constitute an accident or occurrence under a CGL policy. The court held that "defective workmanship by an insured's subcontractor may constitute an 'occurrence' under a modern standard-form [1986 ISO form] CGL policy containing a subcontractor exception to the 'your work' exclusion."[12]

Intentional Conduct Considered a Covered "Accident" or "Occurrence"

There also were a couple of key decisions regarding whether intentional acts can constitute an "occurrence" under CGL policies.

In Employers Mutual Casualty Co.v. Fisher Builders Inc., a CGL insurer brought a declaratory relief lawsuit against insured contractor, among others, seeking a declaration that it owed no duty to its insured in a negligence lawsuit brought by homeowners against the contractor because the contractor's intentional acts (i.e., the removal of certain walls) was intentional and thus was not a "occurrence" under the policy.[13] The district court granted the insurer's motion for summary judgment, finding that the contractor's "conduct was clearly intentional and did not fit within the meaning of 'occurrence' under the policy, 'regardless of whether [the contractor] intended the consequences or not.'"[14] The Montana Supreme Court reversed, holding that "the policy language defining 'accidents' may include intentional acts if the damages were not objectively intended or expected by the insured."[15]

Similarly, in Old Dominion Insurance Co. v. Stellar Concepts & Design Inc., a Florida Court of Appeal addressed the issue of whether an insured's intentional conduct is a covered "occurrence" and/or whether it was barred by the intentional injury exclusion.[16] In the underlying lawsuit, plaintiffs sought damages against the insured claiming that the insured called plaintiffs and played prerecorded messages to solicit business from plaintiffs in violation of the Washington Consumer Protection Act. The insurer argued that there was no coverage because there was no "occurrence," or alternatively, the "expected or intended" exclusion applies to bar coverage because the insured intentionally made the telephone calls and knew that in so doing it would result in loss of use of plaintiffs' telephone lines. The court found that there was no evidence that the insured "intend[ed] to cause an injury or break Washington state law by placing the phone calls," therefore the trial court did not err in finding that the telephone calls constituted an "occurrence" under the policy.[17] The court also found that the "expected and intended injury" exclusion did not apply because the evidence showed that the insured did not intend to cause injury to the underlying plaintiffs by placing the telephone calls, but rather, the insured that it was in compliance with federal laws.[18]

Attorneys' Fees Included in Calculating Ratio of Punitive to Compensatory Damages

The California Supreme Court in Nickerson v. Stonebridge Life Insurance Company, addressed the question of whether "an award of attorney fees under Brandt v. Superior Court, 37 Cal. 3d 813 (1985), properly included as compensatory damages where the fees are awarded by the jury, but excluded from compensatory damages when they are awarded by the trial court after the jury has rendered its verdict."[19] The court held that "[i]n determining whether a punitive damages award is unconstitutionally excessive, Brandt fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered."[20]

Wyoming Adopts the Notice-Prejudice Rule

The Wyoming Supreme Court in Century Surety Company v. Jim Hipner LLC, adopted the notice-prejudice rule.[21] In Century, an umbrella insurer brought a declaratory relief lawsuit against its insured in federal court claiming that it had no duty to defend the insured because the insured failed to provide notice "as soon as practicable." The district court found that the insured timely notified the insurer. The insurer appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit certified a question for the Wyoming Supreme Court concerning the enforceability of a notice provision and the application of the notice-prejudice rule. The Wyoming Supreme Court held that an insurer must show "prejudice ... before coverage may be denied based upon a violation of a notice provision contained in

the policy."[22] The court adopted a two-step approach to an insurer's claim of late notice. First, courts must make a "preliminary determination that an insured's notice was untimely, in violation of the notice requirement contained in the insurance policy."[23] In making this determination, courts will look at "the language of the notice requirement in the policy, the timing of the notice, the insured's knowledge of the underlying facts and ability to provide notice, the sophistication of the parties, the type of insurance at issue, and the reasonableness of any delay."[24] Second, if it is determined that notice was untimely, then the court will determine if the insurer has been prejudiced by the delay.

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[1] Sebo v. American Home Assurance Co., 2016 WL 7013859 (S. Ct. Fla. Dec. 1, 2016).

[2] Id. at *5.

[3] Id.

[4] Id. at *2.

[5] Cypress Point Condominium Ass'n, Inc. v. Adria Towers LLC, 226 N.J. 403 (2016).

[6] Id. at 413.

[7] Id. at 411-12.

[8] Id. at 430.

[9] National Surety Corp. v. Westlake Investments LLC, 880 N.W.2d 724 (Iowa 2016).

[10] Id. at 728.

[11] Id. at 736.

[12] Id. at 744.

[13] Employers Mutual Casualty Co.v. Fisher Builders Inc., 383 Mont. 187 (2016).

[14] Id. at 190.

[15] Id. at 195.

[16] Old Dominion Insurance Co. v. Stellar Concepts & Design Inc., 189 So. 3d 293 (Fla. Ct. App. 2016).

[17] Id. at 296.

[18] Id.

[19] Nickerson v. Stonebridge Life Insurance Co., 63 Cal. 4th 363, 371 (2016).

[20] Id. at 368.

[21] Century Surety Company v. Jim Hipner LLC, 377 P.3d 784 (2016).

[22] Id. at 791.

[23] Id.

[24] Id.
