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NORTHWEST INSURANCE LAW

QUARTERLY NEWSLETTER SPRING 2023

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WASHINGTON FEDERAL COURT RULES LIABILITY COVERAGE PRECLUDED WHEN INSURED HOMEOWNER INTENTIONALLY CONCEALED EVIDENCE OF LEAKING ROOF

Insurance policies provide coverage, pursuant to other provisions, exclusions, and conditions, for losses that are fortuitous, i.e., unintentional and unexpected. To do otherwise would undermine the entire premise of insurance, and place the entire insurance industry at risk by inviting policyholders to seek coverage for intentional acts. In *Allstate Property and Casualty Insurance Company v. Roger A. Plautz et al.*, 2023 WL 2352194 (W.D., Wash. Mar. 3, 2023), the United States Court for the Western District of Washington held that Allstate Property and Casualty Company ("Allstate") had no duty to defend or indemnify a Washington couple ("the Plautzes"), who failed to disclose roof damage during the sale of their house.

Like many homeowner's policies, the Plautzes' policy expressly excluded coverage for property damage "intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person." The buyer filed suit against the Plautzes for an allegedly false seller disclosure statement that did not report prior roof leaks over the past five years. Allstate defended the Plautzes under a reservation of rights and filed a declaratory judgment lawsuit regarding coverage.

The Court in the coverage lawsuit held that the Plautzes were not entitled to coverage because the Plautzes failed to produce any admissible evidence contradicting the buyer's allegations that the Plautzes knew of the water damage and intentionally concealed it, evidenced by a plastic bucket placed under the leaking roof in an unsuspected part of the property's attic. The Court held that by placing the bucket under the roof, the Plautzes knew about the damage and intentionally concealed it, and coverage was precluded under the Policies intentional acts exclusions.

This case is a positive ruling for insurers as it shows that the federal courts are willing to take a broad interpretation of an intentional act exclusion by applying it not only to intentional damage, but to intentional concealment of facts relating to property damage.

WASHINGTON FEDERAL COURT RULES THAT NON-RESIDENTIAL STRUCTURE AFFIXED TO THE GROUND IS REAL PROPERTY NOT PERSONAL PROPERTY

When a term is undefined in an insurance policy, Washington courts apply its plain, ordinary, and common meaning. The Western District of Washington recently held that a non-residential structure that collapsed from a weather event was real property, not personal property, and was therefore not subject to coverage under the subject policy's personal property coverage part. In applying the plain, ordinary, and common meaning of "personal property," the Court held that the fact that the structure was affixed to the ground rendered it real property.

In *Jacobs & Jacobs v. Nationwide Insurance Company of America, United States District Court,* 2023 WL 2307511 (W.D. Wash., Mar. 1, 2023), the policy provided coverage for "direct physical loss" to covered property that was not otherwise excluded by the terms of the Policy. The policy contained three coverage parts: Coverage A – Dwelling; Coverage B – Other Structures; and Coverage C – Personal Property. Under Coverage B, the coverage applied to "other structures on the 'residence premises' set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line, or similar connection." Coverage for personal property under Coverage C applied to "personal property owned or used by an 'insured' while it is anywhere in the world." The policy did not define "personal property."

In September 2017, the Jacobs erected a large, metal-framed, roofed structure (the "Arena") on their property to ride horses in inclement weather. In February 2021, the Arena collapsed from the weight of snow. The Jacobs sought coverage under the Coverage C – Personal Property. Nationwide determined the Arena to be an "Other Structure" and issued payments under Coverage B – Other Structures.

The Jacobs alleged that the Arena was personal property, and that Nationwide breached the terms of the Policy when it applied Coverage B – Other Structures instead of Coverage C – Personal Property. The Jacobs moved for summary judgment, and argued that even if the Arena was not clearly personal property, this term was ambiguous and should be interpreted in their favor. In support of their claim, the Jacobs asserted that the Arena "merely rested on the ground" and that rebar stakes attaching it to the land "were thin and easily removed without harming the land."

Nationwide responded that the Arena was a structure set on, and attached to, the Jacobs' land, making it real property. Nationwide also asserted that the Policy, read as a whole, consistently treated buildings and structures separately from personal property, thus showing that the Arena was not personal property under the Policy.

The Court cited Merriam-Webster's Dictionary, which defines "personal property" as "property other than real property consisting of things temporary or movable." Considering the size, characteristics, labor, and manner in which the Arena was attached to the ground, the Court found the Jacobs' argument that the Arena was potentially moveable was a "strained interpretation" of this definition. There is no question, the Court held, that the Arena was attached to the land by rebar bolts prior to its collapse, and was thus real property. As such, the Arena did not qualify as personal property under the plain, ordinary, and common meaning of the term, and Nationwide properly determined the Arena loss was covered under Coverage B – Other Structures.

In denying the Jacobs' Motion for Summary Judgment, the Court held that the Jacobs not Nationwide had the burden of proving that the Arena fell within the scope of the Policy's insured losses, and the Jacobs had failed to meet their burden of proof in this regard.

The *Jacobs* ruling is a positive development for insurers in that it provides clear guidelines on how "real property" and "personal property" should be defined in a homeowners policy that provides separate coverages for both.

WASHINGTON FEDERAL COURT HOLDS WORD "CONSTRUCTION" IN COMMERCIAL GENERAL LIABILITY POLICY'S "NEW CONSTRUCTION" EXCLUSION IS NOT VAGUE

In Washington, vague words and terms in an insurance policy are generally interpreted in favor of coverage. In *Sec. Natl. Ins. Co. v. Urberg,* 2:21-CV-1287, 2023 WL 2307565 (W.D. Wash. Mar. 1, 2023), the United States District Court for the Western District of Washington held that in a commercial general liability policy that contained a "new construction" exclusion, the word "construction" is not vague, and as the definition of the word "construction" suggests, the average person purchasing insurance could easily understand it to apply only the "building or erection of residential properties."

The underlying plaintiffs (the "Homeowners") purchased newly developed homes in the Ballard neighborhood of Seattle, and sued the homes' developer and the general contractor alleging construction defects (the "Underlying Lawsuit"). In response, the general contractor filed a third-party complaint against the subcontractor, LND Construction ("LND").

LND tendered to its insurer, Security National Insurance Co. ("Security National"), seeking a defense in the Underlying Lawsuit. Security National denied coverage, citing the policies' Designated Work and Designated Ongoing Operations exclusions, commonly referred to as "New Construction Exclusions." Security National then sought declaratory relief in the Western District of Washington that it owed no duty to defend or indemnify LND.

LND subsequently filed for bankruptcy. The Homeowners settled with the general contractor and were similarly assigned any and all claims the general contractor had against LND and Security National. The Homeowners then obtained a default judgment against LND, and later obtained a Writ of Execution in the Underlying Lawsuit, which allowed them to collect on the default judgment from the Security National policy, and effectively assigned to the Homeowners all rights, claims, etc. that LND had against its insurers, including contractual and extra-contractual claims.

Security National first sought to prove that the homes fall under the New Construction Exclusions. Several factors convinced the Court that these homes were indeed new constructions: (1) one Defendant acted as "declarant" for the community; (2) the same Defendant sold one or more of the subject homes; (3) the general contractor Defendant did in fact act as a general contractor for the construction of the homes; (4) the general contractor provided design services on behalf of several named Defendants; (5) the subject homes were only sold one to the Plaintiffs in 2015; *i.e.*, they were the original purchasers; (6) Defendants entered into a real estate purchase and sales agreements; (7) one or more Defendant was a builder-vendor; and (8) Defendants did not construct and/or sell plaintiffs homes that were safe or fit for their intended purpose. Further, Security National advised the Court that the Homeowners brought a Breach of Implied Warranty of Habitability claim, which can only be brought by the first occupant of a new home.

In opposition, the Homeowners claimed that the New Construction Exclusions were vague because the term "construction" was "extraordinarily vague" and an "average person" could not conclude that the homes in the complaint were "new" constructions. In an attempt to benefit from this favorable interpretation, the Homeowners cited to *Madera W. Condo. Ass'n v. Firt Specialty Ins. Corp*., No. C-12-0857-JCC, 2013 WL 4015649 (W.D. Wash. Aug. 6, 2013, wherein the definition of "construction" was also at issue. The Homeowners hoped that the case would plainly show that the term "construction" was vague simply because the exact issue arose before.

However, the Court reasoned that the defective work alleged by Homeowners is "the very definition of what the *Madera* court notes the 'average person' would reasonably think the term 'construction' means: 'As the definition of the word suggests, the average person purchasing insurance could easily understand this exclusion to apply on to the building or erection of residential properties (*i.e.*, new construction)."

The Homeowners next asserted that Security National breached its contract with LND because it failed to defend, failed to conduct a timely investigation, placed its interests above those of the insureds, and failed to indemnify. The Court quickly disposed of the claims for failure to defend and indemnify, holding that, "because Security National did not breach its contract by failing to defend LND, there cannot be a breach for failing to indemnify." Similarly, the Court found, "because Security National did not breach its duty to defend, any arguments that the Homeowners make that it did so in bad faith are unsuccessful."

The Court also highlighted that when "an insurer properly denied coverage and a defense, the insured is not entitled to a presumption of damages." Without this presumption and failing to prove that any delay was 'unreasonable, frivolous, or unfounded,' or resulted in any harm or damages, the Homeowners failed to meet their burden of proof.

This case is favorable for insurers because it builds upon case law and clarifies the term "construction" in the context of New Construction Exclusions. An average person would understand the terms and exclusions apply to the building and rection of residential property. Overall, when an insurer properly denies coverage based on these exclusions, the insurer stands a better chance of defending against extracontractual claims upon a Motion for Summary Judgment.

OREGON COURT OF APPEALS RULES CLAIM PRESENTED AS BREACH OF CONTRACT DID NOT FALL INSIDE DEFINITION OF "OCCURRENCE"

Many general liability coverage claims hinge upon whether the alleged damage was caused by an "occurrence," typically defined as an accident. If the damage was not accidental, coverage is likely precluded. A claim for pure breach of contract is typically not considered an "occurrence," as evidenced by a recent case decided by the Oregon Court of Appeals, *Twigg v. Admiral Ins. Co*., 525 P.3d 478 (Or. App. 2023).

Two new homeowners, Weston and Carrie Twigg, hired Rainier Pacific Development LLC ("Rainier Pacific") to construct a new home. Upon finding several defects in the new construction, the Twiggs filed an arbitration claim alleging that: (1) the home failed to conform to approved plans and specifications; and (2) Rainier Pacific failed to complete the construction within the time allotted.

Hoping to avoid an arbitration award, Rainier Pacific entered into a settlement agreement whereby it agreed to repair the defects. When Rainier Pacific failed to repair the defects in accordance with the settlement agreement, the Twiggs filed a second arbitration claim. The Twiggs prevailed, and the arbitrator awarded damages, stating, "relief is based upon common law principles of breach of contract."

Rainier Pacific tendered a claim to its liability insurer, Admiral. Admiral denied the claim because the alleged damages, an award for breach of the settlement agreement, were not covered under the policy because breach of contract fell outside of the definition of "occurrence," defined in the policy as "an accident, including continuous or repeated exposure to substantial the same general harmful conditions."

When Rainier Pacific filed for bankruptcy, the Twiggs sued Admiral to recover the award. The trial court ruled in Admiral's favor, finding that Admiral had no duty to indemnify Rainier Pacific because the policy provided coverage only for "property damage" caused by an "occurrence."

The Twiggs appealed, and both parties framed the coverage issue as whether the damage fell within the definition of an "occurrence." The Twiggs contended that an "occurrence" could be reasonably understood by an insured to cover damages caused by mistakes in work performance pursuant to a repair contract (*i.e.*, the settlement agreement). They also contended that their theory holds true "irrespective of whether the liability is stated in terms of contract damages, negligence damages, both, or another form of damages."

The Court disagreed. Citing the Oregon Supreme Court case of *Fountaincourt Homeowners' Assn. v. Fountaincourt Dev., LLC,* 380 P.3d 916, 919 (Or. 2016), the Court explained that, in a subsequent proceeding, a party is not entitled to second-guess or retry the nature of the insured's liability. The Court found that the Twiggs initially presented the arbitration claim as a claim for breach of contract, and Rainier Pacific defended the claim as such.

Significantly, the arbitrator understood it to be a breach of contract claim. The Court also found support for this conclusion in the Twiggs' brief: "Indeed the Twiggs acknowledge in their 'briefing before us that they had pled a single contract claim'" for the purpose of invoking the settlement agreement's remedies.

Accordingly, the Court held that the damages for breach of contract fell outside of the definition of "occurrence," and thus coverage was precluded. "Nothing in the text of the relevant coverage provisions or those provisions in the context of the entire policy could reasonably be understood to provide for coverage of Rainier Pacific's liability that arose solely from its breach of its contractual duties under the settlement agreement."

Twigg demonstrates the importance of closely analyzing the nature of the insured's alleged liability in evaluating coverage. The Twiggs presented the claim as breach of contract. Even though the claim originated with construction defects, claiming coverage based only on the failure to perform under the settlement agreement meant the arbitration award did not meet the definition of "occurrence."

INSURANCE TEAM

For over eighty years Williams Kastner attorneys have represented clients in the insurance industry, including primary and excess insurers, reinsurers, self-insurers, agents, brokers, and insurance pools. Our attorneys have advised clients on regulatory and claim handling issues, and have assisted insurers in countless claims from the claim investigation through trial on cases involving coverage and bad faith claims. Please feel free to contact us if you have any questions regarding insurance law in Washington and Oregon.

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