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CONSTRUCTION LAW BLOG

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Illinois Appellate Court Affirms a Declaratory Judgment in Favor of the Insurer Where the Underlying Suit Did Not Allege an Occurrence within the Meaning of the Policy

BY:

In Westfield Ins. Co. v. West Van Buren, LLC, the Appellate Court of Illinois, affirmed the trial court's decision holding that the developer, West Van Buren, LLC ("Van Buren"), was not entitled to defense and indemnification under the policy of the roofing subcontractor, Total Roofing, because the suit did not allege an "occurrence."

In 2002 Van Buren constructed a condominium development in Illinois and subcontracted with Total Roofing for the construction of the roof. In connection with the project, Total Roofing obtained a CGL policy with Westfield Insurance Company ("Westfield"), which offered coverage for property damage caused by an "occurrence."

After construction was completed and shortly after the Condo Association took charge of the building, the Condo Association claimed construction defects including roof leaks that infiltrated the building and individual apartments. The Condo Associated demanded that Van Buren reconstruct the roof but when Van Buren refused, the Condo Association paid for the repairs itself and sought reimbursement from Van Buren and Total Roofing, alleging shoddy workmanship breach of warranty and consumer fraud.

Westfield denied coverage to Van Buren but afforded defense to Total Roofing under reservation of rights. Westfield filed suit seeking a declaration that it owed no duty to defend to Van Buren and the trial court ultimately found in favor of Westfield, holding that Van Buren was not entitled to defense or indemnification. The appellate court affirmed, stating that it was questionable whether Van Buren was even an additional insured because the policy language implied that the additional insured coverage was limited to coverage available to the named insured during ongoing operations, and the Association's suit involved leaks which occurred after the roof was completed. Regardless, the main focus of the court's decision was the lack of a "property damage" caused by an "occurrence." In this regard, policy defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy defined "property damage" as "a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."

The Appellate Court reached its decision for the following three reasons:

1. Westfield's policy required an accidental event to trigger coverage alleged intentional bad acts by the developer and resulting damage due to shoddy workmanship of which Van Buren was allegedly aware. Since the alleged damage was not an accident, it was not an "occurrence" and, therefore, the allegations did not fall within coverage under the policy.
2. The allegations in the Complaint did not constitute "property damage" based upon case law holding that "physical" injury occurs when property is altered in appearance, shape, color or other material dimensions. Travelers Ins. Co. v Eljer, 197 IL 2d 278, 308 (2001). The Association's allegations that shoddy work by Total Roofing diminished value of the units did not constitute "physical" injury.
3. The factual allegations of personal property damage set forth in the complaint were not offered for purposes of recovery and were only tangential to the claims. Therefore, those allegations do not trigger coverage. Further, the Association was not acting on behalf of individual unit owners, nor was the complaint amended to include the unit owners.

Based upon the foregoing, the Court found that Westfield had no duty to defend Van Buren and, as such, no duty to indemnify.

The decision includes a vigorous dissent.