TRAUB LIEBERMAN

INSURANCE LAW BLOG

April 15, 2019

# Illinois Court Addresses Coverage Owed For Subcontractor's Defective Work

BY: Brian C. Bassett

In *Acuity Ins. Co. v. 950 W. Huron Condo. Ass'n*, 2019 IL App (1st) 180743, the Illinois Court of Appeals held that a claim against a subcontractor for damage caused to property outside the scope of its work satisfied the insuring agreement of a CGL policy.

The condominium association for the building located at 950 West Huron Street in Chicago, Illinois ("the Association"), sued its general contractor and construction manager Belgravia Group, Ltd., and Belgravia Construction Corporation (collectively "Belgravia"). The Association sought to recover for alleged defects from Belgravia's unworkmanlike construction of the building that permitted water to permeate and cause damage.

In the Association's complaint, it alleged that in June 2002, after the Association took possession of the building but prior to the completion of construction, Belgravia became aware of numerous conditions and defects, including extensive water infiltration of the building. After discussing the issues with Belgravia, the Association claimed that Belgravia retained contractors to provide cosmetic fixes. However, this did not address the problems and defects. The Association alleged that it spent a substantial amount of money to identify and correct the damage and that it would incur additional costs for future repairs.

Belgravia, in response, filed a third-party complaint containing multiple counts of breach of contract and negligence against all subcontractors that worked on the building, including the carpentry subcontractor Denk & Roche Builders, Inc. ("Denk & Roche"). Belgravia alleged that if it was found liable to the Association for any amount, then its liability was due to the defective work performed by Denk & Roche. Denk & Roche held consecutively issued commercial general liability insurance policies with two insurers, Cincinnati Insurance Company ("Cincinnati") and Acuity Insurance Company ("Acuity"), during the relevant period.

Denk & Roche tendered its defense to both of its insurers. Cincinnati agreed to defend it and represented Denk & Roche in a settlement of the construction claims. However, Acuity denied that the allegations against Denk & Roche triggered its duty to defend under its CGL policy, and filed suit seeking a declaration to that effect – naming Denk & Roche, Belgravia, and the Association as defendants. Cincinnati intervened and filed a third-party counterclaim against Acuity, seeking declarations that Acuity owed Denk & Roche a defense, and that Acuity therefore owed Cincinnati equitable contribution.

The trial court granted summary judgment for Acuity and denied judgment for Cincinnati, finding that the allegations of the underlying complaints did not allege damages caused by an "occurrence," and because Acuity did not owe a duty to defend, Cincinnati was not entitled to equitable contribution.

In reversing, the court repeatedly referenced the decision in *Milwaukee Mut. Ins. Co. v. J.P. Larsen, Inc.*, 956 N.E.2d 524 (1st Dist. 2011). In *Larsen*, the 1st District Court of Appeals held that damage to other materials not provided by the insured constituted both "property damage" and an "occurrence," triggering coverage under a CGL policy. In the instant case, Acuity emphasized that it is completely foreseeable that a construction defect would cause damage to other elements of the project and that such natural and ordinary consequences of defective construction cannot be treated as an "occurrence" under a CGL policy. However, as the court recognized in *Larsen*, even though there is no occurrence when a subcontractor's defective workmanship necessitates removing and repairing work, damage to something other than the project itself does constitute an occurrence under a CGL policy.

The 1st District Court of Appeals, applying *Larsen*and several other Illinois cases, stated that when an underlying complaint alleges that a subcontractor's negligence caused damage to occur to a part of a construction project outside of the subcontractor's scope of work, this constitutes an occurrence under CGL policy language. The court further stated that the reasoning in *Larsen*is consistent with the well-settled precedent that when a complaint alleges an insured contractor's faulty workmanship caused damage to other property, there is a duty to defend. The did note, however, that a similar claim against a general contractor or developer of a project would have forced a different result, as the entire building is part of their project.

The court also rejected Acuity's argument that Cincinnati could not pursue a claim in equitable contribution for reimbursement of defense costs. Acuity argued that because the parties' two policies were consecutive, as opposed to concurrent, the policies insured different risks and equitable contribution was unavailable. The court found that the policies sufficiently covered the same risk from a duty to defend perspective to allow the equitable contribution claim.

Accordingly, the Appellate court reversed the summary judgment ruling for Acuity, holding that the claims against Denk & Roche were within, or potentially within, Acuity's policy coverage that entitled the subcontractor to a defense from Acuity. As a result, Cincinnati was entitled to equitable contribution from Acuity for undertaking the subcontractor's defense, with the exact amount being a question for the trial court to answer upon remand.