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COZEN O'CONNOR

Court Denies Developer Insurance Coverage to Repair Defective Construction

In *Curtis Park Group, LLC v. Allied World Specialty Insurance Company* (2024 WL 5194886 (10th Cir. 2024)), the U.S. Court of Appeals for the Tenth Circuit determined that an insured real estate developer could not recover the hard costs associated with repairing a defective concrete slab because the insured did not suffer an actual loss. Rather, the insured's contractor was solely responsible for the repair costs pursuant to the parties' construction contract.

Background

The insured hired a general contractor to construct a development consisting of five buildings, four of which were to be supported by a single concrete slab. The insured and the general contractor agreed that the general contractor would front the initial construction costs, as well as potential repair costs. They also agreed that the insured had the right not to reimburse the general contractor for the cost of repairing defective work that arose from its negligence or failure to fulfill its contractual obligations. As part of the project, the insured procured a builder's risk policy from its insurer that covered "direct physical loss or damage caused by a covered peril … in the course of construction, erection or fabrication."

The Claim

During construction, the insured discovered excessive deflection, or sagging, in the concrete slab. Therefore, the insured rejected the general contractor's work, and, pursuant to their contract, the general contractor was obligated to front the repair costs. The insured noticed its claim to the insurer seeking to recover the cost of repairing the deflecting slab. Following its investigation, the insurer denied coverage based upon a defective construction exclusion. Shortly thereafter, the insured and its general contractor entered into a project closeout agreement whereby the parties agreed that the insured would not be responsible for reimbursing the general contractor for the hard costs of repairing the deflecting slab.

The Lawsuit

The insured ultimately filed suit against the insurer alleging, among other things, breach of contract. During the litigation, the insurer discovered the close-out agreement and the fact that the insured had not paid and would never pay the general contractor. Consequently, the insurer filed a motion in limine to exclude evidence of the hard costs portion of the insured's claim.

The Tenth Circuit determined that although the slab's deflection could be considered "direct physical loss or damage," the insured could not recover for another party's losses and was required to suffer an actual loss to receive coverage. Below is some of the court's rationale:

- The insured was the only named insured, and the policy stated that it did not cover more than the named insured's "insurable interest in any property."
- The policy expressly prohibited benefits to unnamed parties: "Insurance under this coverage will not directly or indirectly benefit anyone having custody of [the named insured's] property."
- The value of covered property was measured using replacement cost. To that extent, the policy explicitly limited recovery to the amount the insured *actually spent* to repair the deflecting slab: "If part of the covered property that sustains direct physical loss or damage is repaired or replaced, the payment will not *exceed the amount [the named insured] spend[s] to repair or replace the damaged or destroyed property*." In other words, the Court stated that the insured could not "recover costs it need not pay for."

In sum, the court explained that since the repair costs were borne by the general contractor, the

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insured could not recover as it suffered no actual loss.

Conclusion

Just as the Tenth Circuit noted, the purpose of insurance is to repair or restore; it is not intended to allow an insured to secure a profit. If an insured could recover more than its own actual loss, it would permit a windfall. In the course of construction, issues often arise, and policyholders turn to their insurers. However, *Curtis Park* makes clear that, depending on policy language, insureds are not automatically entitled to indemnity whenever there is damage to covered property.