Commercial General Liability Does Not Cover Breach of Contract Damages

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The types and limits of insurance and additional insured coverage are important negotiation points during the construction contract formation process. The coverages and limits can make or break a deal.

The owner of a project will often require its general contractor/construction manager to name the owner (its lenders and any other individual and/or entity with an interest in the property) as additional insureds on the general contractor/construction manager's commercial general liability (CGL) policy and on any excess/umbrella (umbrella) policies. When this is done properly, the general contractor/construction manager's CGL and umbrella insurance carriers will provide indemnity and defense, if a covered event under the respective insurance policy occurs on the project. Then, the owner would not be required to incur any litigation costs (including payment of damages) and provide any of its own insurance that it has procured, should a covered event occur.

In a recent case, a court was asked to determine whether event(s) at a construction project triggered additional insurance coverage and whether the general contractor's CGL and umbrella insurance companies were required to provide the project's owner with indemnity and defense.

Before the completion of a renovation to a mall, the owner terminated its general contractor for cause. As one of the stated reasons for the termination, the owner claimed that the roof installation performed by a subcontractor was defective.

The general contractor, pursuant to the contract, was required to name the owner as an additional insured under its CGL policy and umbrella policy. According to the insurance policies, coverage for an additional insured was triggered only with respect to liability from bodily injury, property damage or personal and advertising injury caused in whole or in part by the acts or omissions of the insured or those acting on the insureds behalf.

After termination, the general contractor commenced an action against the owner for breach of contract, unjust enrichment and to foreclose on a mechanic's lien. Thereafter, the owner commenced an action against the general contractor's CGL and umbrella carriers seeking a declaration that these insurers were obligated to defend and indemnify the owner in the action commenced by the general contractor.

The insurance company defendants moved to dismiss the action and obtain a judgment declaring that they were not obligated to provide coverage to the owner. The owner cross-moved for leave to amend its complaint. The trial court granted the insurance company defendants' motion and declared that they were not obligated to defend and indemnify the owner. The trial court also denied the owner's cross-motion to amend. The owner appealed.

On appeal the court looked to the allegations in the general contractor's complaint against the owner to determine whether the general contractors' insurers had a duty to defend the owner. The appellate court found that the allegations in the general contractor's complaint were exclusively for breach of contract, unjust enrichment and the foreclosure of a mechanic's lien. In upholding the trial court's decision, the appellate court found that there were no claims in the general contractor's complaint for bodily injury, property damage or personal and advertising injury as was required to trigger coverage under the policies. Moreover, the appellate court reiterated the general rule that a CGL policy does not afford coverage for breach of contract, but rather for bodily injury and property damage.

The appellate court also held that the trial court properly denied the owner's cross-motion to amend its complaint. While leave to amend pleadings is freely given in the absence of prejudice or surprise to the opposing party, the court noted that such a motion should be denied where the proposed amendment is palpably insufficient or devoid of merit. Here, the appellate court held that the proposed amendments were palpably insufficient as none of the additional facts alleged in the proposed amended complaint established the owner's potential liability for bodily injury, property damage, or personal and advertising injury.

Commentary

This recent case demonstrates that while the general contractor obtained the proper coverage and additional insured coverage, the underlying claims in the general contractor's action against the owner did not trigger coverage for the owner under the general contractor's insurance policies. The lesson to be learned here is that CGL and umbrella insurance cover potential liability for bodily injury and property damage. CGL and umbrella insurance policies are not meant to cover breach of contract damages.

The owner, however, could have made a claim under the general contractor's CGL and umbrella policies, if it incurred property damage to other parts of its building as a result of the subcontractor's improper roof work, e.g., water leaks causing damage to finished walls and/or damaging other parts of the mall.

Confirming that the bargained for insurance and additional insurance coverage has been obtained is something that should be verified before a contractor and/or subcontractor steps foot on a project. The subject insurance policies and any exclusions to coverage also should be thoroughly reviewed. Moreover, once a potentially covered event occurs, knowing the type of insurance claims to make and when to make them are very important decisions that should be considered with the assistance of legal counsel.

Feel free to contact me to discuss insurance claims and insurance coverage on construction projects.