

Client Alert

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Loss of Coverage Due to Insured's Failure to Obtain Consent to Settlement Illustrates The Importance of Obtaining Sound Coverage Advice Throughout The Claim Process

On December 16, 2013, the United States Court of Appeals for the Fourth Circuit held in *Perini/Tompkins Joint Venture v. ACE American Ins. Co.*, No. 12-2415 (4th Cir. Dec. 16, 2013), that an insured construction project manager was not entitled to reimbursement under either a primary or excess liability insurance policy for its settlement of underlying litigation arising from a construction accident because the insured failed to obtain the insurer's consent before entering into the settlement.

Background

The underlying litigation arose from an accident at a large-scale hotel construction project. Gaylord National LLC (Gaylord) hired a joint venture of Perini Building Company and Turner Construction Company (PTJV) to manage the construction of a \$900 million hotel and convention center in suburban Washington, DC. Damage to the project occurred when a section of the hotel's glass atrium collapsed during construction. Litigation between Gaylord and PTJV followed. PTJV eventually settled the litigation but failed to notify its liability insurer, ACE American Insurance Company (ACE), or obtain ACE's consent prior to entering into the settlement.

Six months after the settlement, PTJV sought reimbursement from ACE for portions of the settlement not covered by other insurance. ACE issued a reservation of rights letter identifying various potential grounds for a denial of coverage, including policy exclusions, late notice and the voluntary payment of monies without the insurer's consent. PTJV filed suit in the US District Court for the District of Maryland to recover the settlement proceeds and the parties moved for summary judgment. The district court held that PTJV entered into the settlement without ACE's consent and, consequently, vitiated its coverage under the terms of its insurance policy.

Appeal

Upon review, the United States Court of Appeals for the Fourth Circuit affirmed the district court's decision and held that PTJV had violated the policies' "voluntary payments" and "no-action" provisions by failing to notify ACE of the litigation and obtain consent prior to entering into a settlement with Gaylord. The policies contain a standard "voluntary payments" provision that says no insured will, except at its own cost, voluntarily make any payment, assume any obligation or incur any expense without the insurer's consent. In addition, the policies' no-action clause expressly requires that any settlement be supported by a release signed by the insurer, the insured and the claimant. Finally, the policies' duty to defend clause affords the insurer the right to investigate and settle any claim.

Because an ACE representative had been on-site at the time of the collapse, ACE knew the collapse had occurred. But the record is devoid of any indication that ACE ever received notice of the Gaylord lawsuit, any offers of settlement, or the settlement that PTJV would eventually enter into. Nor is there any indication that PTJV had engaged coverage counsel to assist it with and advise it on the handling of the underlying claim. Consequently, when it came time to settle the underlying claim, PTJV proceeded with an apparent lack of understanding of its duties to keep ACE apprised of settlement developments and to

seek consent from ACE before entering into any final settlements. By failing to involve ACE in its settlement discussions and eventual settlement with Gaylord, ACE contended that the insured breached multiple provisions of its liability insurance policies. The result was a complete loss of coverage for what otherwise should have been a covered settlement.

Implications

Perini/Tompkins illustrates the critical importance of ensuring that policyholders obtain sound coverage advice at all stages of the claim. Involving experienced coverage counsel from the outset of a claim will help to ensure that the policyholder satisfies any conditions to coverage and complies with any potentially applicable policy requirements. Experienced coverage counsel are available not only to assist with the litigation of claims that mature into lawsuits, but also to advise policyholders about how to prepare claims for presentation and help monitor claims through the adjustment and payment process to ensure that maximum recovery is obtained.

The Insurance Coverage Counseling and Litigation attorneys at Hunton & Williams are available to assist and advise with any of your insurance-related matters.

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