



Weekly Law Resume

A Newsletter published by Low, Ball & Lynch
Edited by David Blinn and Mark Hazelwood

WEEKLY LAW RESUME™

Issue By: DAVID L. BLINN

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Insurance Coverage: Duty to Defend— Condominium Exclusion

California Traditions, Inc. v. Claremont Liability Insurance Company

Court of Appeal, Fourth District (July 11, 2011)

In an effort to curtail costs, many general liability policies sold in the construction industry contain an exclusion for construction of condominiums or townhomes. This case considers the extent of the exclusion to homes which, although sold as condominiums, had more in common with single family homes.

California Traditions, Inc. ("California Traditions"), the developer of a housing development, hired Ja-Con Systems, Inc. ("Ja-Con") to perform the rough framing work for 30 residential units in a development. Ja-Con was insured under a comprehensive general liability policy issued by Claremont Liability Insurance Company ("Claremont"). Claremont's policy excluded from coverage any work done on condominiums or townhomes, stating "It is agreed that coverage is not provided for property damage or bodily injury that arises out of an insured's operations, work product or products that are incorporated into a condominium . . . or townhouse project."

The project in question consisted of what appeared to be single family homes, with no common walls, and little other physical indication that they were condominiums. However, to avoid more restrictive set-back requirements, and to increase density of construction, the project was submitted as a condominium project, the plans referred to them as condominiums and they were marketed as condominiums. At the time he bid the project, Ja-Con's owner knew his policy did not cover condominiums, and he was concerned that the project might involve condominiums. He asked California Traditions, and was told (falsely) that the project did not involve condominiums.

After the development was completed, one of the owners sued California Traditions, which in turn cross-complained against Ja-Con. Claremont initially defended Ja-Con, but subsequently pulled coverage, based on the condominium

San Francisco Office

505 Montgomery Street, 7th Floor | San Francisco, CA 94111 | Phone: 415-981-6630 | Fax: 415-982-1634

Monterey Office

2 Lower Ragsdale Drive, Suite 120 | Monterey, CA 93940 | Telephone: (831) 655-8822 | Fax: (831) 655-8881

Web: www.lowball.com



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exclusion. California Traditions then obtained a \$2,000,000 default judgment against Ja-Con, and then brought an action directly against Claremont, seeking to obtain payment under the policy. Claremont brought a motion for summary judgment, based on the condominium exclusion. California Traditions opposed the motion, contending that the policy had no definition for "condominium," and that the policy was thus ambiguous, and must be interpreted most favorably to the insured, and that a reasonable insured would not have expected that the language in the policy would exclude coverage for the homes in question, which did not bear any physical resemblance to typical condominiums. The trial court found that the exclusion was not ambiguous, and that there was no potential for coverage, and granted the motion. California Traditions appealed.

The Court of Appeal was not persuaded that the term "condominium project" was ambiguous, because both the term "condominium" and the term "condominium project" were meticulously defined by statute. In fact, that definition included projects composed of freestanding units. The undisputed facts showed that the units were developed and marketed as condominiums, that the policy excluded coverage for condominiums, and that Ja-Con knew its policy did not cover work on condominiums. The Court also noted that simply because the homes did not look like condominiums did not make the policy language reasonably susceptible to any interpretation other than the clear exclusion of coverage for construction of them.

The Court of Appeal was not persuaded by declarations filed by California Traditions in which it averred that the project was composed of single family residences. The Court noted that this did not raise a triable issue of fact, as these were mere "broadly phrased and conclusory assertions."

Finally, the Court did not agree with California Traditions' position that there was a triable issue of fact as to whether Ja-Con had a reasonable expectation of coverage, because at the time it was working on the project, it believed it was working on single family residences. The Court of Appeal first noted that even if Ja-Con had subjectively believed the policy would afford coverage for the project, when the language was unambiguous, as here, the insured's subjective belief would not have been reasonable. The Court also noted that the only reason Ja-Con might have believed there was coverage was the misleading representations by California Traditions at the outset, which led Ja-Con to believe the homes were not condominiums. The Court did not believe California Traditions could mislead Ja-Con into believing it had coverage, and then step into Ja-Con's shoes to take advantage of that belief and profit from its own fraud. The Court affirmed judgment in favor of Claremont.

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COMMENT

This case is important in affirming that clear language in the condominium exclusion will overcome subjective belief of the insured. Holders of policies with similar exclusions need to make certain they know what they are building if they want to assure themselves of coverage.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/D057154.PDF](http://www.courtinfo.ca.gov/opinions/documents/D057154.pdf)

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