



Insurers Have a Duty to Defend Construction Defect Claims ... Maybe.

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Earlier this week, the Intermediate Court of Appeals (ICA) issued an important decision, concluding that insurance companies have a duty to provide a defense for policyholders when they are sued for construction defects. This seems like good news to the insureds. But all is not clear after the court's ruling. Indeed, the situation is even more muddled than before.

Before we go further, here's the bottom line in our view: If a policy was issued *before* May 2010, then an insured is entitled to a defense, subject to exclusions in the policy. If, however, a policy was issued *after* that date, securing coverage may be problematic without an endorsement designed to provide potential coverage for construction defect claims.

Why the confusion? In an earlier May 2010 decision, the ICA concluded that insurers have *no duty* to *pay* construction defect claims for their insureds, reasoning that construction defect claims are not accidental and thus not an "occurrence," and therefore do not trigger coverage. That decision created a firestorm in the industry as after paying thousands—and sometimes millions—of dollars in premiums for coverage against construction defect claims, owners and contractors suddenly found their insurers disclaiming any coverage for construction defects.

In response, in 2011 the Legislature enacted Act 83, which defines "occurrence" in accordance with the law in effect at the time the policy was issued. Thus, the latest decision which addresses the equally important issue of whether the insurer must provide a defense to construction defect claims, establishes that insurers must defend construction defect claims under policies issued prior to the earlier May 10, 2010 decision because, the court stated, coverage issues were then "unclear," and must therefore be decided in the insured's favor. For policies issued after that date, however, insurers will likely argue that the May 10, 2010 ICA decision clearly established that Hawaii law does not recognize coverage for construction defects and, thus, there is no duty to defend.

This issue is far from resolved. The Hawaii Supreme Court has not yet weighed in, even though its existing decisions strongly suggest that construction defect claims arise from an "occurrence" or accident, and the ICA got it wrong when it concluded otherwise.

Until the Supreme Court resolves that question, policyholders will be left in legal limbo.

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