Weekly Law Resume

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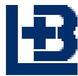

WEEKLY LAW RESUME™
Issue By: DAVID BLINN

May 17, 2012

Insurance Coverage–Contribution Action–Self Insured Retention

Axis Surplus Insurance Company v. Glenco Insurance Ltd Court of Appeal, Fourth District (April 11, 2012)

When an action for equitable contribution is brought by a settling insurer against a non-participating carrier, the settlement is presumptive evidence of the non-settling insurer's liability and the amount thereof. This case considered the effect of a Self-Insured Retention ("SIR") on the non-settling carrier's exposure to a contribution claim.

This case arose out of a construction defect lawsuit. Pacifica Point L.P. purchased the Carmel Pointe apartments in 2004 and subsequently converted them to condominiums. After their completion, the homeowners association brought a construction defect suit against Pacifica. The homeowners' experts came up with a preliminary defects list with a total cost of repair of $13,976,250. The defense experts' preliminary repair estimate totaled $1,466,747.50. The Association made a time limited settlement demand of $1,000,000.

Pacifica was insured in 2004-2005 and 2005-2006 by a commercial general liability policy issued by Axis Surplus Insurance Company. It also had obtained a specific wrap-up/owners controlled insurance policy ("OCIP") for the Carmel Pointe Project from Glenco Insurance Ltd. with a policy period from 2004-2007. Glenco's policy had a $250,000 SIR, and it provided that Glencoe had no duty to investigate or defend any claim until Pacifica satisfied the SIR. Axis agreed to defend under a reservation of rights. Because of the unsatisfied SIR, Glenco did not accept the tender, but reserved its rights and "monitored" the claim, requesting notification once Pacifica satisfied its SIR.

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Glencoe was advised of the time limits settlement demand and the repair estimates, and declined to participate in the settlement, claiming it did not have sufficient information to agree to fund a settlement at that time. However, Glencoe did not object to Pacifica contributing its SIR to a settlement funded by Axis up to the proposed $1,000,000 demand. Axis paid its $750,000 share of the settlement, and the remainder was paid by Pacifica's own payment of the SIR of $250,000.

Axis thereafter filed an action for equitable contribution against Glenco. At trial, the court determined that Axis had met its burden of proof to establish a claim for equitable contribution with regard to the $750,000 settlement, and it apportioned responsibility between the two carriers at 60% to Glencoe (with three years' coverage) and 40% to Axis (with two years' coverage). Axis was awarded $450,000 as damages against Glencoe. Glencoe appealed.

The Court of Appeal agreed with the trial court. Citing Safeco Ins. Co. of America v. Superior Court (Weekly Law Resume June 29, 2006), the court noted that a settling carrier only needs to show the potential for coverage under the non-settling carrier's policy on a contribution claim, and the burden then shifts to the non-settling carrier to prove there was no actual coverage under its policy. The Court of Appeal held the evidence of the settlement here met Axis' burden of proof on the contribution claim.

Glencoe had argued that Axis had to prove that Pacifica's $250,000 payment was for covered "property damage" as defined in the Glencoe policy, and that this had not been done. The Court of Appeal disagreed. Because the settlement here included the insured's payment of the SIR, the Court of Appeal held that the SIR shared the presumptive effect of the settlement as well, and that Axis had no obligation to prove the SIR applied only to "covered property damage" as defined in the Glencoe policy.

Glencoe had also argued that the trial court erred in finding Axis satisfied its burden of proof because Axis did not and could not establish that Glencoe had a legal obligation to provide a defense prior to the date of the settlement. The payment of the SIR triggered Glencoe's satisfaction of the SIR, and the settlement agreement was entered into two weeks before the SIR was actually paid out. Glencoe argued that it thus never had a legal obligation to provide a defense or indemnity prior to the settlement.

The Court of Appeal agreed that a critical question in any action for equitable contribution between insurers was whether the nonparticipating insurer had a legal obligation to provide a defense or indemnity coverage for the claim. However, the Court noted that an equitable contribution claim was not based on contract, but instead on "equitable principles designed to accomplish ultimate justice in the bearing of a specific burden." Here, Glencoe was aware of and had been monitoring the underlying action. Glencoe's principal witness admitted that subject to satisfaction of the SIR, it would have had a duty to defend and potentially indemnify. To allow it to defeat an equitable contribution claim merely based on the timing of the payment of the SIR would award Glencoe for its inaction and work an injustice, particularly as Glencoe had specifically approved the payment of the SIR towards the settlement.

The Court of Appeal affirmed the trial court's judgment in favor of Axis.

COMMENT

This case holds that where a non-participating carrier is aware of the action and the pending settlement, it may not rely on the timing of its insured's payment of an SIR as the only obstacle to its participation in the defense and/or settlement of the underlying action to avoid exposure to a contribution action by a participating carrier.

For a copy of the complete decision see:

HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/D058963.PDF

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