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Construction Policies Often Cover Liability Claims

Some contractors, developers are unaware that insurance covers lawsuit defense

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Oftentimes, insurance policyholders in the construction industry (e.g., contractors, developers, manufacturers, suppliers) fail to consider their insurance policies when a lawsuit is brought against them alleging liability arising out of a construction project. The policyholders may have incorrectly assumed that their particular insurance does not provide coverage for certain common construction claims. Such assumptions can mean policyholders unnecessarily pay hundreds of thousands of dollars to defend themselves against liability claims, simply because they did not think to ask their insurer to pay for their defense. The same can be said where a policyholder asks its insurer to pay, but does not do so in a timely manner (in other words, the policyholder provides late notice of a liability claim to an insurer).

When construction clients walk through the door with a liability claim, attorneys representing them should immediately consider whether any insurance coverage is even potentially available, from any source.

By its very nature, construction can involve a variety of liability claims, perhaps more so than any other industry. Even with certain workers' compensation limitations, job site bodily injury claims pose a risk to those in the construction industry, especially if an injured worker is not a culpable liability policyholder's employee. In such an instance, however, the nonemploying policyholder's commercial general liability (CGL) insurer should defend a related liability claim. CGL insurance is the most commonly implicated insurance in the context of construction liability claims. Professional liability insurance policies can also be implicated when there are allegations of design error or the failure of some duty in connection with a professional service (e.g., architectural, engineering, construction management).

While bodily injury claims are common, liability arising out of alleged defects in construction or faulty workmanship can pose the gravest exposure

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for construction-related policyholders. Such claims may involve, for example, use of an improper project component (e.g., substandard pipe), failure of a component or improper installation of a component. Many times, policyholders and insurers alike do not consider these types of claims to be covered under CGL policies, blithely considering them more akin to a simple failure to deliver the work or product promised under the operative construction contract. Consequently, policyholders do not even consider asking their insurer to provide coverage for such a claim, and as a result, policyholders may end up costing themselves the benefit of coverage under the very insurance policy, or policies, purchased over years of dutiful premium payments.

It is important for policyholders to recognize that liability insurance is sometimes referred to as litigation insurance, and an insurer's duty to defend is broad, unlike an insurer's duty to indemnity the policyholder (i.e., the duty to pay any settlement or judgment on behalf of the policyholder). See *Security Ins. of Hartford v. Lumbermens Mut. Cas.*, 264 Conn. 688 (2003). Moreover, the Supreme Court of Connecticut recently confirmed the breadth of CGL coverage in the construction context. See *Capstone Building v. American Motorists Ins.*, 308 Conn. 760 (2013).

Simply put, policyholders in the construction industry, or any policyholder for that matter, should almost always give notice of a liability claim as soon as possible, even when they doubt the existence of coverage under their policies. Construction insurance policyholders should consult their insurance brokers regarding the possible impact of claims on their renewal premiums, but obtaining coverage for an expensive liability claim likely outweighs any impact on premium. If a policyholder does not submit a claim to its insurer, the policyholder will never know if it could have obtained coverage; and if the policyholder submits a claim late, it could forfeit coverage to which it might otherwise have been entitled.

Fortunately, in Connecticut, unlike in some states where late notice of a claim can be an absolute bar to coverage, a policyholder does not forfeit coverage solely because of providing late notice to an insurer. In Connecticut, the insurer must show that it has been prejudiced by any failure by a policyholder to provide timely notice. See *Arrowood Indem. v. King*, 304 Conn. 179 (2012). Note, however, that a showing of prejudice is not likely required by an insurer when late notice is provided under an insurance policy which expressly provides that claims must be reported within the policy period. Such policies are commonly referred to as "claims-made and reported" policies and are, most commonly, professional liability insurance policies. Policyholders should also notify excess and umbrella liability insurers of a claim at the same time as notifying a primary CGL or professional liability insurer.

Even if notice is timely, policyholders need to be aware that insurers will likely take the position that any defense costs incurred by a policyholder before notice was given to the insurer are impermissible voluntary payments and, therefore, will not be reimbursed by the insurer. The same argument will likely be made by an insurer regarding any settlements agreed to by a policyholder prior to giving notice to its insurer. In these instances, a policyholder should argue, as with late notice, that its insurer was not prejudiced by the policyholder's incurring of defense costs or agreeing to settlement, in that such costs or settlement were reasonable, and would have been incurred or agreed to even had the insurer received prior notice.

If an insurer does not respond to notice of a claim, policyholders should persist in seeking a response, even if such response is a denial of coverage. Furthermore, despite what some insurers might argue, policyholders should not need to formally refute an insurer's denial in order to preserve coverage; but, at the same time, policyholders (and their attorneys) must be mindful of any statutory, or contractual, limitation of action issues. That being said, it can sometimes be a productive exercise to have counsel refute an insurer's denial of coverage with a coverage (push-back) letter, before considering any litigation against an insurer. First, setting forth the argument for coverage to the insurer may, in some instances, result in an insurer reversing its position on further consideration. Second, if a policyholder has brought a coverage action against its insurer, the insurer's coverage counsel will have the opportunity to fully consider the position set forth by the policyholder in its "push-back" letter, a position which might be obscured in the policyholder's coverage complaint.

Because of the regularity, variety and severity of liability claims in the construction industry, construction insurance policyholders, and their attorneys, need to be particularly knowledgeable, and aggressive, regarding the policyholders' rights under construction insurance policies. Otherwise, these policyholders may just be buying insurance for the sake of buying insurance, never fully benefiting from the premiums they pay. ■