# Recent Developments in the Law

## Special Edition - Insurance Coverage Duty to Indemnify and Duty to Defend

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Insurance Coverage
Duty to Indemnify & Duty to Defend

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In the case Harbor Court Associates, et al. vs. Kiewit Construction Company, et al., filed on April 24, 1998, the United States District Court for the District of Maryland made important strides in defining an insurance companies duty to defend and indemnify general contractors and sub-contractors in construction cases.

The issue before the court regards a motion filed by a general contractor and two separate motions filed by two of the sub-contractors involved in the same project. The motions are in reference to an insurance company's duty to defend and/or indemnify the contractors as suit has been filed against them concerning a project that they had been contracted to build.

The Harbor Court Associates and Murdock Development Company hired the general contractor Kiewit Construction Company to build the Harbor Court Complex, a 28 story high-rise in Baltimore, Maryland. Murdock Development Company assembled an insurance program for the general contractor as well as the sub-contractors. All parties involved in the construction of the premises were also covered by American Motorists Insurance Company (AMICO) and had excess coverage through several carriers including Wausau Insurance Companies.

The Plaintiffs, Harbor Court Associates and Murdock Development Company filed suit because the Harbor Court Complex suffered from structural problems allegedly stemming from the masonry, the steel erection system, the water drainage systems, and the expansion joints. The Plaintiffs claimed that several bricks had already fallen from the structure. The Complaint alleged a total of eleven counts including negligence, breach of contract, and indemnification against each Defendant. The named Defendants in the suit were: the general contractor, Kiewit Construction Company; the sub-contractor for masonry, Sherman R. Smoot Company; and the sub-contractor for steel, SMI-Owen Steel Company, Inc.

The three Defendants filed a third-party Complaint against AMICO and all excess carriers stating that AMICO had a duty to defend them in any litigation and a further duty to indemnify them against damages they may be forced to pay because of litigation. They filed motions with the U.S. District Court for the District of Maryland moving for partial summary judgment concerning the duty to defend.

The Maryland case law established that if the Plaintiffs "allege a claim covered by the policy, the insurer has a duty to defend." Brohawn v. Transamerica Ins. Co., 276 Md.396, 347 A.2d 842. Additionally, if the Plaintiffs do not allege a claim clearly covered by the policy, but there is a potential for the claim to be covered, the insurer has a duty to defend. Conly v. Gibson, 355 U.S. 41; St. Paul Fire & Marine Ins. Co. V.

Pryseski, 292 Md. 187, 438 A.2d 282.

According to precedent, the issue of the present court was to examine the terms of the insurance policy and determine the scope of coverage and its limitations. Then, the court needed to determine whether the allegations in the Complaint would be covered under the policies issued. The court focused on the AMICO policy as all excess policies followed this form using identical language as the AMICO policy.

There were six portions of the AMICO policy which were examined in effort to determine the coverage of the insurance. They were listed as follows: Property Damage, that "Which Occurs During the Policy Period", that which is "Caused by an Occurrence", the "Insured's Product" Exclusion, the "Insured's Work" Exclusion, and the "Owned Property" Exclusion.

Property Damage was defined as "physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom." The alleged damages of the bricks falling from the structure of the building in question constituted physical injury under this definition. Therefore, the insurance policies could not bar coverage for absence of damage.

The second task was to determine if the property damage occurred within the policy period. The Complaint did not specify when the first evidence of damage occurred. Because of the lack of clarification concerning a date that began the property damage, Maryland case law demands that we assume the damage occurred during the coverage period.

The next object of examination concerned the policy wording and meaning "Caused by an Occurrence". Under the policy in question, occurrence was defined as "an accident or a happening or event or a continuous or repeated exposure to conditions which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The court determined that the term "happening" was very broad included the said damage to the brick venier of the building in question. Then the Court examined if the occurrence was expected or intended. In Lerner Corp. v. Assurance Co. Of America, 120 Md. App. 525, 707 A.2d 906, the Court of Special Appeals interpreted Maryland law so that if damages relate to the contractual bargain, they are not unexpected. If the Building does not meet the contractual requirements agreed upon, the purchaser is entitled to correction of the defect. The United States District Court in the case at hand, defined the term "expected" to refer to damages that an insured would be liable to correct due to its contractual obligations. Any damages that occurred due to "expected" reasons, were not covered by the insurance policies; however, any damages caused by an "occurrence" would be covered. The court gave the following example: damages arising from a brick falling from the building onto a car below would be an occurrence which is covered. The court saw no principled difference between this example and damages caused by a subcontractor's work that effected other portions of the building other than their contracted assignment. With this incite, some of the damages that were alleged against Defendants Owen-Steel and Smoot- Masonry were a product of an occurrence as they were not expected by-products or consequences of their work, but effected the building as a whole or another contractor's work. They may be held liable for their own work, but are entitled to coverage for damage done to the work of others. Under this line of thought, Kiewit, the general contractor, was not entitled to coverage. Because the entire building was the responsibility of the general contractor, Kiewit cannot claim that any damage or defect was unexpected or caused by an occurrence. By the above definitions every defect concerning the construction of the building was to be "expected" by the general contractor. Consequently, there was no duty for the insurance company to defend the general contractor on these grounds. The Plaintiffs' Complaint sought to hold the sub-contractors liable for damages that their work caused to other structures, thus falling under the "occurrence" definition. Therefore, the sub-contractors are entitled to the insurers defense coverage in litigation.

The "Insured's Product" Exclusion and the "Insured's Work" Exclusion were not applicable reliefs of the duty to defend for the sub-contractors. The sub-contractors were entitled to defense under the claim that defects in their work and / or product caused damages to other parts of the building. They were not

permitted to seek coverage for the cost of repairing damage to their work product.

The policy that was taken out by the owners of the building named HCA/Murdock as insured parties. The Plaintiffs' argued that the "Owned Property" Exclusion incorporated into the policy was not applicable to any of the contractors because they, as owners, were named. However, the policy had a provision that stated the "insurance afforded applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the company's liability". Therefore, the Plaintiffs' ownership did not barr coverage for the other individually named parties.

In view of the examination of the policy, the United States District Court held that the general contractor, Kiewit Construction Company, had no potential coverage, and the two sub-contractors, Sherman Smoot Company and SMI-Owen Steel Company, had some potential coverage. With this decision made, Maryland law forced the insurance companies to provide a defense for the sub-contractors. The insurance companies were not held responsible for providing a defense for the general contractor. The motion for partial summary judgment of the general contractor, Kiewit, was denied. The motions for partial Summary Judgment filed by the sub-contractors Sherman Smoot Company and SMI-Owen Steel Company were granted.