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Federal Court Applies Virginia's Potentiality Rule; Requires General Liability Insurer To Defend Bodily Injury Claim From Exposure To Sealant Fumes

In *Penn National Mutual Casualty Insurance Company v. Block Roofing Corporation, et al.*, Civ. No. 2:09-312 (E.D. Va. Dec. 14, 2010), a federal court in Virginia ruled that a roofing company was entitled to a defense under its general liability insurance policy for a suit alleging bodily injury caused by exposure to fumes from the company's use of a roofing sealant. The court found that, even though the complaint did not expressly allege that the roofing company brought the materials "into" the building, there was nonetheless a potential for coverage that was sufficient to trigger the insurer's duty to defend.

Factual Background

Block Roofing Corporation was hired by Sentara Leigh Hospital to repair a roof at one of Sentara's buildings. The roof repairs required Block to use several sealants and adhesives. During the course of the repairs, vapors and fumes escaped into the building and caused a nurse employed by Sentara to become violently ill.

Penn National Mutual Casualty Insurance Company had issued a commercial general liability policy to Block that covered it for, among other things, its roofing repair work at Sentara. The policy

contained a pollution exclusion, which barred coverage for bodily injury caused by vapors and fumes. Block tendered the nurse's suit to Penn National for defense and indemnity. Penn National initially reserved its rights to disclaim coverage based on, among other things, the policy's pollution exclusion. Penn National then sought a declaration that it did not owe coverage to Block for the nurse's injuries. Block contended that coverage was available because an exception to the policy's pollution exclusion specifically provided coverage for "bodily injury ... sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed" at the building.

The Duty to Defend

Virginia courts follow the "eight corners rule" to decide whether a liability insurer has a duty to defend an insured against a lawsuit brought against that insured. In essence, this rule is a combination of the "exclusive pleading rule" and the "potentiality rule." The "exclusive pleading rule" requires that a court determine the insurance company's duty to defend "solely by the claims asserted in the pleadings," while the "potentiality rule" extends the "exclusive pleading rule" and mandates

that if there is any “potentiality” that a plaintiff’s allegations may state a claim covered by the policy, then the insurer must defend its insured.

Penn National contended that the exception did not apply. According to Penn National, the plain language of the exception required that Block bring the materials *inside* the hospital. Penn National argued, therefore, that because the complaint in the underlying lawsuit failed to expressly allege that any materials were brought into the building, the exception did not apply. Block, citing the potentiality rule, argued that even though the complaint may not have expressly alleged that materials were brought into the building, the allegations could be viewed in such a way that the proof at trial could invoke coverage. For instance, the nurse could have been harmed by fumes that escaped the roof area through one of the several vent pipes that reached the interior of the building or she could have been injured when its workers carried the sealant and related materials by her workstation located inside the hospital. Block also argued that Penn National’s strained interpretation necessarily rendered the exception to the exclusion ambiguous and, therefore, construction of the exception must favor coverage.

The court agreed with Block. The court construed the exception to mean that Block need not actually bring the repair material into the interior of the hospital, as Penn National contended. Rather, the court found that the roof is part of the building and that “when a contractor applies materials to, or incorporates materials into, a building’s roof, that contractor necessarily brings materials into that building.” The court buttressed its construction by noting that if it were to accept Penn National’s interpretation of the term “into,” that reading would, at a minimum, render the term ambiguous given Block’s contrary, but reasonable, interpretation of the term. As such, following Virginia law the court must construe the exception in such a way that favors coverage.

Additionally, and as an independent basis for coverage, the court held that Penn National’s argument failed to apply the “potentiality rule” in connection with the duty to defend analysis. The court explained that, based on the allegations of the underlying complaint, a potential existed for proof at trial that implicated the exclusion’s exception. Thus, even if such facts were not expressly alleged in the complaint, there was nevertheless a potential for such facts to be developed in the underlying litigation. For this independent reason as well, the court

held that the exception to the pollution exclusion applied and Penn National must defend Block under its policy.

Finally, the court found that it need not reach the duty to indemnify issue because that issue requires actual proof of facts and because the underlying litigation had not yet been resolved.

Implications

Block reinforces the broad nature of an insurer’s duty to defend under Virginia law. This ruling demonstrates that the “eight corners rule” under Virginia law will not mechanically restrict consideration to the literal “four corners of the complaint” when determining an insurer’s duty to defend. Rather, in order to determine whether an insurer must defend, the court may look beyond the complaint’s allegations to determine whether the stated allegations create at least a potential for proof in the underlying litigation that could implicate coverage under the terms of the policy. *Block*, therefore, underscores that, at least in Virginia, both insureds and insurers alike should pay close attention to whether the complaint allegations might give rise to at least a possibility that the actual proof at trial might implicate coverage. If such a possibility exists, a defense may be owed.

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