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FLORIDA FEDERAL COURT REJECTS INSURER'S ATTEMPT TO AVOID INDEMNITY FOR DAMAGE CAUSED BY CONSTRUCTION DEFECTS

By *Walter J. Andrews, Michael S. Levine, and Anna P. Lazarus*

This article discusses a Florida federal court decision rejecting an insurer's attempt to avoid coverage for \$23 million of damage caused by defective work, finding that the policyholder's claim raised several genuine issues of material fact.

In *Pavarani Construction Co. (SE) Inc. v. ACE American Insurance Company*,¹ a case of significance to property owners, contractors, and real estate developers alike, a federal court in Florida recently rejected an insurer's attempt to avoid coverage for \$23 million of damage caused by defective work, finding that the policyholder's claim raised several genuine issues of material fact.

Background

The plaintiff, Pavarani Construction Company, was a general contractor for the construction of a 63-floor mixed-use condominium tower. Pavarani was covered by three relevant insurance policies:

- (1) a commercial general liability policy issued by American Home Assurance Company;
- (2) an excess liability policy issued by ACE that afforded coverage over the American Home policy; and
- (3) a subguard policy issued by Steadfast Insurance Company.

Pavarani hired subcontractors to work on the condominium project, at least one of which performed deficient work by failing to install or by improperly locating reinforcing steel in the concrete masonry unit walls. According to Pavarani, the defective work caused damage to the exterior stucco; water intrusion in the penthouse enclosure; and cracking in the concrete of columns, beams and shear walls.

After exhausting the American Home policy's limits, Pavarani sought indemnification from its excess insurer, ACE, for repairs necessitated by the subcontractors' deficient work. When ACE refused to cover the excess loss, Steadfast, the issuer of the subguard policy, agreed to participate in funding the repairs, and assigned its recovery rights to Pavarani. Pavarani then sought indemnification from ACE on Steadfast's behalf for more than \$23 million in costs, fees and prejudgment interest.

Analysis and Holding

ACE sought summary judgment on two issues, both of which were rejected. ACE first contended that the claim against Pavarani did not seek damages that were because of "property damage," but rather sought coverage for the cost of repairing a subcontractor's deficient work. In response, Pavarani submitted an affidavit stating that the repairs concerned damage caused by the defective work as distinct from the defective work itself. The court found that the affidavit, if credited by the factfinder, raised a factual question as to whether Pavarani's repairs were to the damage caused by the defective work and not repairs of the defective work itself. The court concluded, therefore, that the affidavit raised an issue of fact as to the type of damage corrected by the repairs, which rendered summary judgment inappropriate.

ACE next argued that coverage was not triggered under its excess policy because coverage under the underlying subguard policy had not yet been exhausted. The court rejected that argument as well, finding that the excess liability policy applied only for loss in excess of the general liability policy, not the subguard policy since, according to the language of the ACE policy, only the general liability policy issued by American Home was identified as "underlying insurance."

Lastly, in a second summary judgment motion, ACE argued that coverage was barred under the ACE policy because the claims for damages against Pavarani occurred after the effective period of the ACE policy had ended and before that policy period was extended by an endorsement that provided for an extension of coverage to "commence at the time that the project has been completed and accepted by the owner." The court found a dispute among the parties, however, as to when the project had in fact been "completed and accepted by the owner." Thus, for this reason as well, the court found a genuine issue of material fact to be in dispute.

Implications

Pavarani serves as a reminder that insurers may not avoid their broad duty to defend claims that raise issues of fact concerning the availability of coverage for a claimed loss. This is particularly the case where coverage turns on issues concerning causation. Policyholders, therefore, should be prepared to offer opinions as to the cause of a subject loss, especially where the insurer is seeking summary judgment concerning its duty to defend, since any genuine issue of material fact ordinarily will be sufficient to defeat the insurer's motion and force the case to a determination by the finder of fact, which is often a jury.

Endnote

1. *Pavarani Construction Co. (SE) Inc. v. ACE American Insurance Company*, Case No. 14-cv- 20524-KING (S.D.Fla., Feb. 25, 2015).

About the Authors

Walter J. Andrews is head of the insurance litigation and recovery practice at Hunton & Williams LLP, focusing his practice on program audits, policy manuscripting, counseling, litigation, and arbitration. **Michael S. Levine** is a counsel at the firm, representing commercial clients in insurance recovery and business disputes. **Anna P. Lazarus** is an associate the firm handling insurance coverage and labor and employment law matters, as well as commercial disputes. The authors may be contacted at wandrews@hunton.com, mlevine@hunton.com, and alazarus@hunton.com, respectively.

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