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NEW CASE UPDATE

California Court of Appeal Holds that Calderon Act Claims Constitute a "Suit" Under Commercial General Liability Policies

Clarendon America Insurance Co. v. Starnet Insurance Co.
2010 WL 2904995 (Cal.App. 1 Dist.)
July 27, 2010

HOLDING

The provision in a commercial general liability insurance policy requiring the insurer to "defend the insured against any 'suit' seeking. . .damages" includes the duty to defend the insured in proceedings under the Calderon Act (California Civil Code § 1375, et seq.)

WHY THIS CASE IS IMPORTANT

The decision by the Fourth District Court of Appeal on the issue of whether proceedings under the Calderon Act constitute a "suit seeking damages" is a matter of first impression in California. Commercial general liability policies typically define "suit" as "a civil proceeding in which damages because of 'bodily injury,' 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged." However, commercial general liability policies are silent as to whether proceedings under the Calderon Act and other similar pre-litigation procedures applicable to construction defect litigation, such as the Right to Repair Act (California Civil Code § 895, et seq.), fall within the definition of a "suit."

This case is important for anyone involved in defending construction defect litigation through the Calderon Act or the Right to Repair Act. This ruling provides builders, developers and general contractors involved in defending claims under these Acts with a right to defense and coverage for these claims under commercial general liability insurance policies although no complaint has been filed by the claimant.

FACTS

This case arose out of a construction defect action commenced by the Westwood Ranch Homeowners Association, Inc. ("Association") against Centex Homes, the developer of the project. The Association served Centex Homes with a Notice of Commencement of Legal Proceedings pursuant to Civil Code section 1375, setting forth a list of alleged construction defects. WSM Transportation dba Sam Hill & Sons, Inc. ("Sam Hill") was a subcontractor on the project and Starnet Insurance Company ("Starnet") insured Sam Hill. The Starnet policy issued to Sam Hill also named Centex Homes as an additional insured pursuant to the terms of the subcontract agreement between Centex Homes and Sam Hill. The commercial general liability policy issued by Starnet defined the term "suit" as follows:

"'Suit' means a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged. 'Suit' includes: [¶] a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or [¶] b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent."

Clarendon America Insurance Company ("Clarendon") issued a commercial general liability policy to another subcontractor, Ebensteiner Company. Centex Homes was afforded coverage under the Clarendon policy issued to Ebensteiner Company as an additional insured. Centex Homes filed a complaint against Clarendon seeking payment of defense fees and costs incurred in defending the Calderon Act claim commenced by the Association. Clarendon, in turn, filed a cross-complaint against the other additional insurers, including Starnet, seeking a declaration that they were obligated to

provide Centex Homes with a defense and/or coverage. Starnet then moved for summary judgment, asserting that claims under the Calderon Act do not constitute a "suit" as defined in its commercial general liability insurance policy.

The trial court denied Starnet's motion for summary judgment, finding that claims under the Calderon Act are civil proceedings in which damages are alleged and therefore fall within Starnet's definition of "suit". Starnet appealed the decision, and the Fourth District Court of Appeal affirmed.

DISCUSSION

In this case, the Court of Appeal was presented with the question of whether an action commenced under the Calderon Act constitutes a "suit," as defined in Starnet's commercial general liability policy. The Court of Appeal answered this question with a resounding "yes, finding that "[a]lthough the Calderon Process occurs before a complaint is filed and itself does not result in a judgment or court-ordered payment of money, the Calderon Process is an integral part of construction defect litigation initiated by a common interest development."

In contrast, Starnet asserted that a Calderon Act claim does not fall within the definition of "suit" because the claim cannot result in a party being obligated to pay money damages. Starnet relied upon the Supreme Court's previous decision in Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal.4th 857, 887, to argue for a bright-line, literal interpretation of the definition of "suit" and to rely upon the definition of "suit" given by the court in Foster-Gardner, which defined "suit" as "a court proceeding initiated by the filing of a complaint." The Court of Appeal declined to follow the definition of "suit" in Foster-Gardner, indicating that the policies at issue in Foster-Gardner predated the Starnet policies and that subsequent to Foster-Gardner, the standard insurance form had been amended to broaden the definition of "suit".

After providing a detailed recitation of the Calderon Process and its prelitigation requirements, the Court of Appeal determined the term "civil proceeding" encompasses the Calderon Process because (1) it is a mandatory proceeding created by the Civil Code that is required before a common interest development association may file a complaint alleging construction or design defect damages; (2) it is the first part in a continuous litigation process; and (3) it is tied directly and securely to an association's complaint for damages against the builder, developer or general contractor. As such, the Court of Appeal found that the Calderon Process is more than a prelitigation alternative dispute resolution requirement and cannot be divorced from the subsequently filed complaint.

While not specifically addressed by the Court of Appeal in this case, based upon the above line of reasoning, this decision is equally applicable to claims under the Right to Repair Act. The Right to Repair Act is a mandatory proceeding that must be complied with before a complaint for construction or design defect damages may be filed (Civil Code § 910.) The Right to Repair Act is the first part in a continuous litigation process, and the Right to Repair Act is directly and securely tied to a claimant's damages. In fact, Civil Code section 935 expressly acknowledges the similarities of the two prelitigation procedures. Thus, by analogy, the holding of this case should equally apply and should be extended to claims under the Right to Repair Act.

As a result of this case, insurers will no longer be able to deny coverage to their primary and/or additional insureds on the basis that claims under the Calderon Act and/or the Right to Repair Act do not constitute a "suit" within the definition of that term in commercial general liability policies.

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