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Alerts

Eleventh Circuit Affirms Insurers' Denial Under Voluntary Payments and "Roofing Operations" Exclusions

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Insurance Coverage Alert

In *Rolyn Cos., Inc. v. R & J Sales of Texas, Inc.,* No. 09-16348; 2011 WL 320421 (11th Cir. Feb. 2, 2011) (*per curiam*), the underlying claim involved a restoration project at a residential building complex following a hurricane in 2005. The insured, a general contractor specializing in disaster-recovery construction, was retained to repair the buildings. In turn, it retained the services of a roofing subcontractor. Due to the subcontractor's allegedly faulty workmanship, one of the buildings suffered property damage from water intrusion following a heavy rainstorm. Without first notifying its insurers, the insured repaired the interiors of all of the affected units at a cost in excess of $1.3 million. The insured subsequently sued the subcontractor for breach of contract. It also sued its two insurers, seeking a declaration that both insurers owed a duty to reimburse the insured for its expenses and damages incurred.

The first insurer denied coverage under the policy's "voluntary payments" clause, which stated that: "[n]o insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent."

The insured argued that it was legally obligated to address the damage caused by its subcontractor and that the repair costs to the damaged building were therefore not voluntary. However, the Eleventh Circuit agreed with the district court, which held that the insured was not acting in an emergency situation requiring an immediate response to protect its legal interests.

The appellate court specifically noted that there was no record evidence that the insured was called upon to immediately respond and fix the damage and that, in fact, there was evidence that the insured spent several months attempting to get the subcontractor to make the repairs. The Eleventh Circuit held that such a broad reading of "legally obligated" would "effectively delete the voluntary-payment provision from the policy." Rather, the court treated the insured's voluntary actions as a failure to cooperate with the first insurer, which constituted a material breach and substantially prejudiced the first insurer's rights in the defense and would release the first insurer from the obligation to pay. For example, the voluntary completion of the repairs by the insured would have a material effect on potential litigation against the insured, including the possibility of settling the potential case against it. Also, because the first insurer never refused to defend the insured, the insured was not excused from failing to seek the first insurer's consent before incurring the costs to repair the damaged building.

Regarding the policy with the second insurer, the second insurer had denied coverage under its "roofing operations" exclusion, which stated that:

This insurance does not apply to "property damage" to any building, structure or the contents thereof, caused by your failure or the failure of any subcontractor working on your behalf:

1. To properly cover any unfinished roof or section of roof during the course of roofing operations against the influx of wind, rain, sleet, hail, snow or any other substance.

It was undisputed that at the time of the rain event that caused the damage, the roof had not been completed. However, the insured contended that at that stage of the work, the roof was “dried in” and that the subcontractor therefore would not have been expected to tarp the roof. The Eleventh Circuit held that even if the roof was “dried in” there was no question that it was “unfinished” and that it was not “properly covered” to prevent rain incursion. Thus, the exclusion completely barred coverage under the policy with the second insurer.

Practice Note

While the Eleventh Circuit stated that the insurer must be substantially prejudiced by the voluntary payment in order to bar coverage, it did not explain how an insurer can prove this. Nor did the court make any factual findings of prejudice in this case. Rather, the court seems to have found prejudice as a matter of law. With respect to the “roofing operations” exclusion, it is important to note that substantial completion of the roof is insufficient and that the exclusion requires the insured or its subcontractors to “properly cover” the roof until the roof is fully completed.

Because this decision makes it clear that an insured’s voluntary payment is treated as a breach of the cooperation clause, insurers must comply with Florida’s Claim Administration Statute (FCAS), Fla. Stat. § 627.426(2) (2010) to preserve this defense. Section 627.426(2) requires an insurer to serve a reservation of rights letter within 30 days after it knew or should have known of certain coverage defenses, such as breach of cooperation. Within 60 days of serving the reservation of rights letter or receipt of a summons and complaint naming the insured as a defendant, whichever is later, the insurer must either deny coverage, obtain a nonwaiver agreement from the insured or retain mutually agreeable counsel to defend the insured. Failure to comply with the FCAS may result in a waiver of a voluntary payment defense.

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