

Construction Management and Professional Liability Exclusions, Surface Waters Coverage Update

January 2, 2024

Construction Management and Professional Liability Exclusions – Eighth Circuit (Missouri Law)

Liberty Insurance Corp. v. HNTB Corp.

No. 22-3301, 2023 WL 8415910 (8th Cir. Dec. 5, 2023)

The U.S. Court of Appeals for the Eighth Circuit reversed the federal district court's decision on HNTB Corp.'s (HNTB) motion for partial summary judgment against Liberty Insurance Corp. (Liberty), finding that a genuine question of material fact remained as to whether coverage was excluded under the subject commercial general liability policy issued by Liberty.

The coverage dispute arose out of a bridge collapse at a construction site, which injured several workers. The injured workers sued HNTB, an engineering firm involved in the project, in state court, alleging the injury was caused by HNTB's on-site engineer's failure to inspect the bridge deck. At the time of the collapse, HNTB maintained a commercial general liability policy and umbrella policy with Liberty. While Liberty initially agreed to participate in the defense of the underlying workers' lawsuit, Liberty ultimately determined that there was no coverage for this incident under the general liability policy due to policy exclusions and stopped participating. HNTB settled the underlying lawsuit with the injured employees for \$2.5 million, without Liberty's involvement.

Liberty brought a declaratory judgment action in the federal district court, asking for a declaration that it did not have to indemnify HNTB for the settlement of the underlying workers' lawsuit pursuant to "construction management" and "professional liability" exclusions. HNTB then brought a counterclaim against Liberty, seeking the opposite ruling. The district court granted partial summary judgment in favor of HNTB, finding that Liberty was the financially responsible party for the underlying workers' lawsuit.

The policy's "construction management" exclusion precludes coverage for "inspection, supervision, quality control, architectural or engineering activities done by or for HNTB on a project it served as a construction manager" or "the rendering of or failure to render any professional services with respect to... providing engineering... services to others in HNTB's capacity as engineer." "Professional

services” include “supervisory or inspection activities performed as part of any related architectural or engineer activities.” Liberty, as well as the workers, raised the issue of HNTB’s own “Project Work Plan,” which lists responsibilities including “recommending sound engineering solutions” and “actual and potential problems associated with the construction project work” as evidence they were engaged in these excluded activities.

The appellate court concluded that “Liberty’s obligation to pay depends on the focus of the workers’ lawsuit.” If the damages “arose out of an activity the policy excludes,” Liberty would have no obligation to pay HNTB. The appellate court reasoned that whether the underlying lawsuit was covered by the Liberty policy turns on a factual dispute, which can only be resolved by a factfinder. The appellate court concluded that “[w]ith coverage hanging on the resolution of a factual dispute over HNTB’s role on the bridge project, summary judgment is unavailable.” The case was remanded to the trial court.

By: Chelsea Saferian

Surface Waters – First Circuit (Massachusetts Law)

Zurich Am. Ins. Co. v. Med. Properties Tr., Inc.

Nos. 23-1167, 23-1180, 2023 WL 8729897 (1st Cir. Dec. 19, 2023)

In this first-party property insurance dispute, the U.S. Court of Appeals for the First Circuit held that the issue of whether the term “surface waters” included rainwater that accumulated on a hospital’s parapet roofs and rooftop courtyard had to be certified to the Massachusetts Supreme Judicial Court for consideration.

On June 28, 2020, a severe thunderstorm passed through Norwood, Massachusetts. The storm significantly damaged Norwood Hospital Facility (hospital), a building owned by Medical Properties Trust, Inc. (MPT) and leased to Steward Health Care System, LLC (Steward). Heavy rains and strong winds caused flooding in the basement of the hospital’s two buildings. Rainwater also accumulated on the hospital’s roofs and second-floor courtyard and water entered the hospital’s upper floors.

MPT sought coverage for the resulting storm damage from its property insurer, Zurich American Insurance Company (Zurich). Steward also sought coverage from its insurer, American Guarantee and Liability Insurance Company (AGLIC). The Zurich and AGLIC policies provided limited coverage for damage caused by “flood.” Both policies defined “flood” as:

A general and temporary condition of partial or complete inundation of normally dry land or structure(s) caused by:

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The unusual and rapid accumulation or runoff of surface waters, waves, tides, tidal waves, tsunamis, the release of water, the rising, overflowing or breaking of boundaries of nature or man-made bodies of water; or the spray there from all whether driven by wind or not[.]

Although Zurich and AGLIC initially concluded that the storm damage to the upper floors did not fall within the policies' flood sub-limits, they later changed their positions, asserting that the damage was caused by flooding.

Both insurers filed declaratory judgment actions in the U.S. District Court for the District of Massachusetts seeking a determination that the losses were subject to the policies' flood coverage sub-limits. The parties moved for partial summary judgment regarding the interpretation of "surface waters." The trial court certified the issue for interlocutory appeal and then granted the insurers' dispositive motions, finding that the term "surface waters" included waters above the ground, including those that accumulate on a roof before flooding the structure.

The appellate court held that whether water pooling on a roof constitutes "surface waters" within the meaning of the policy is a novel one that has not yet been addressed by the Massachusetts Supreme Judicial Court (SJC). As such, the appellate court certified the issue to the SJC for its consideration.

By: Amy Diviney