



Case Alert

Affirmed: Insureds Bear the Burden of Allocating Covered Versus Uncovered Losses

The Second Circuit recently affirmed a district court decision that an insured bears the burden of establishing what portion of a jury verdict constitutes covered damages¹.

The case arose out of claims for property damage resulting from construction defects in a homebuilding project. The homeowners fired the construction manager, J. Barrows, Inc. (“JBI”), who then sued the homeowners in state court for unpaid fees (the “Underlying Action”). The homeowners counterclaimed, alleging breach of contract and negligence. JBI’s commercial general liability insurer, Harleysville Worcester Insurance Company (“Harleysville”), agreed to defend JBI under a reservation of rights.

Shortly before trial of the Underlying Action, Harleysville moved to intervene to submit special interrogatories to the jury on the issue of allocating damages between covered and uncovered claims. Harleysville argued that damages resulting from faulty workmanship were not covered under the policy, but damages to other property may be covered. JBI opposed Harleysville’s motion, while the homeowners took no position. The court denied Harleysville’s motion, and neither JBI nor the homeowners made any further attempt to have the jury address the allocation issue. The jury found in favor of the homeowners and awarded them \$317,840.00 in general damages and \$83,788.00 in consequential damages.

The homeowners subsequently commenced an action against Harleysville seeking a declaration that the damages were covered under JBI’s policy. The district court had previously granted summary judgment in favor of Harleysville on this issue because the homeowners had not proposed a method of separating the damages between covered and uncovered claims.

On appeal, the homeowners argued that the burden was on Harleysville to prove which damages were not covered, and because Harleysville had not advised JBI, its insured, of its interest in the allocation. The Second Circuit was not persuaded by their arguments. Because the homeowners had not taken a position on Harleysville’s motion to intervene and had numerous opportunities to present evidence on the allocation issue, the Second Circuit saw no reason to shift the burden from the insureds to the insurer. The Second Circuit thus affirmed the district court’s award of summary judgment in Harleysville’s favor.

This case serves as a reminder to policyholders of the importance of ensuring that the jury in the underlying case allocates damages between covered and uncovered claims or the need to present evidence of covered damages in an action against an insurer. Policyholders involved in construction defect litigation must be acutely aware of the allocation issue and work with insurance coverage counsel and their underlying defense counsel to ensure that their proposed jury instructions and verdict forms take the relevant insurance implications into consideration.

For more information about this case and how similar issues may impact your construction defect claims, contact K. Alexandra Byrd at kab@sdvlaw.com or (203) 287-2127, or C. Lily Schurra at cls@sdvlaw.com or (203) 287-2138.

1. *Uvino v. Harleysville Worcester Ins. Co.*, Nos. 16-3225-cv(L), 16-3356-cv(XAP), 2017 WL 4127538 (2d Cir. Sept. 19, 2017).