



Case Alert

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Illinois Favors Finding Construction Defects as an Occurrence

A recent Illinois Appellate Court's decision in, *Acuity Ins. Co. v. 950 West Huron Condominium Owners Association*, 2019 IL App (1st) 180743 (2019), strengthens Illinois' precedent favoring construction defects as an occurrence under a Commercial General Liability ("CGL") insurance policy. *Acuity* also broadens an insurance carrier's obligation to defend its insured against construction defect allegations.

In *Acuity*, the court determined whether claims for construction defect filed against a subcontractor, triggered a duty to defend under a CGL policy. To make its determination, the court focused on the subcontractor's scope of work. The court notes that a subcontractor normally contracts for a discrete scope of work on a project. Unlike a general contractor, who has control over or contractual obligations for all aspects of the project, a subcontractor does not have those board responsibilities. The court explained that "[f]rom the eyes of the subcontractor, the 'project' is limited to the scope of its own work, and the precise nature of any damage that might occur to something outside of that scope is as unknown or unforeseeable as damage to something entirely outside of the construction project."

Accordingly, the court in *Acuity* held that when a complaint alleges that a subcontractor's negligence caused damage to a part of the construction project outside of the subcontractor's scope of work, the allegations are enough to trigger the insurer's duty to defend the subcontractor under a CGL policy. The court's decision in *Acuity* relied on a similar Illinois Appellate Court decision, *Milwaukee Mut. Ins. Co. v. J.P. Larsen, Inc.*, 956 N.E.2d 524 (Ill. App. 2011). In *Larsen*, the court reached a similar conclusion where a third-party complaint by a general contractor against a subcontractor alleged that the subcontractor's improper window caulking caused water intrusion and property damage to other parts of the building. The court in *Larsen* held that because the complaint alleged not only construction defects, but also damage to other property outside the subcontractor's scope of work, the insurer had a duty to defend the subcontractor.

The court in *Acuity* also recognized two federal cases applying Illinois law with similar fact patterns finding insurance coverage when an insured's workmanship caused damage to a project beyond the scope of the insured's own work. First, in *Ohio Casualty Insurance Co. v. Bazzi Construction Co.*, 815 F.2d 1146 (7th Cir. 1987), the United States Court of Appeals for the Seventh Circuit found that a CGL insurer owed its insured a defense against allegations that the insured negligently poured concrete while remodeling a garage that damaged the existing garage structure. The court explained that because the damage affected the existing garage structure it damaged work other than the project itself; thus, the damage was covered. Second, in *Westfield Insurance Co. v. National Decorating Service, Inc.*, 147 F. Supp. 3d 708 (N.D. Ill. 2015), the court determined that damage beyond the scope of the work performed by the subcontract is subject to insurance coverage. The damage that arose during the construction of a condominium building affected the walls, ceilings, floors, balconies, and furniture. The court concluded the insurer had a duty to defend the subcontractor and contractor in the underlying action because the damage affected parts of the condominium beyond the scope of the insured's work.

With this decision as well as similar state and federal jurisprudence, Illinois courts will likely find construction defects to be an occurrence so long as the alleged damages involve property damage to something other than the insured's own work. Notably, Illinois courts find that an insurer has a duty to defend its insured when a complaint alleges that the insured's negligence caused damage to a part of the construction project outside of the insured's scope of work.

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