

PROVING AN INSURANCE POLICY COVERS A CLAIM

by DOUG REES

It has never been easy to prove that an insurance policy covers a claim, but decisions by the Texas Supreme Court have made litigating covered claims even more challenging. Counsel attempting to prove coverage must show that the policy's terms cover the damage and that the damage falls within the policy period. If the dispute involves covered and noncovered claims, attorneys must segregate the damages. Lawyers must prove these damages by competent and admissible evidence, and they often will require expert testimony.

First, some background. The duty to indemnify (to provide coverage to an insured for damages under an insurance policy) differs from the duty to defend (to provide a defense to the insured related to claims against the insured). The insurance carrier frequently defends claims against the insured under a reservation of rights, meaning the carrier provides a defense for the insured while reserving its right to deny coverage for the claims.

In the Texas Supreme Court's 2009 decision in *DR Horton-Texas Ltd. v. Markel International Insurance Co. Ltd.*, the court held that a duty to indemnify may exist even when a duty to defend does not. The insurer may be obligated to provide coverage even when it correctly has denied a defense and has not been involved in the underlying action.

• *Demonstrating coverage.* The insured bears the burden of proving that the insurance policy covers the insured's damages. In a typical construction-defect case, for example, multiple policies can be at issue. The insured must show not only that the claimed damages constitute an occurrence resulting in property damage but also that the property damage first occurred in the policy period in question.

An often more challenging issue arises

when covered and noncovered damages are involved. In those circumstances, the insured's burden of proof involves another factor. The insured must show what damages fall within coverage and then segregate or allocate them from those that do not. An insured's failure to sustain either burden is fatal to its recovery under the insurance policy.

• *Evidence.* Showing that the damages constitute an occurrence resulting in property damage in the particular policy period requires evidence. This can be a problem if neither a court nor a jury ever determined the actual damages. As a practical matter, the parties often do not actually litigate which damages the policy covers, although they sometimes negotiate those issues when resolving the underlying claims.

For an insured to meet its burden, its evidence must be in order. If the underlying claim settled, the insured first must prove the settlement was reasonable. The fact that the damages did not occur to the insured makes gathering evidence more challenging. On the other hand, the insured now controls the damages and how it proves them in the coverage action.

The types of evidence at the insured's disposal are essentially the same as they are for any other action. But in coverage litigation, lawyers often present the evidence by way of affidavit, as opposed to live testimony. This is because the ultimate question of coverage is a question of law, and the issues are often presented by summary judgment motion. The rules of evidence, however, still apply, and the insured must be careful to present the evidence in an admissible fashion.

In this kind of construction-related insurance litigation, the plaintiff in the underlying action may bring claims for loss of use against the insured, in addition to bringing claims for repair damages. Such loss-of-use damages may constitute property damage and thus be covered

by the policy. To prove these types of damages, an insured typically will have to come up with some sort of damage model and an expert economist. This involves a significant amount of work and expense.

• *Expert testimony.* Perhaps the most significant impact on litigation over the duty to indemnify is the change in the law regarding the trigger of coverage brought about by the Texas Supreme Court's 2008 decision in *Don's Building Supply Inc. v. One Beacon Insurance Co.* *Don's Building* has ushered in a whole new era. Texas lawyers have yet to see the full effect of this decision, but it appears to increase significantly the level and detail of proof required in many cases.

Don's Building provides that the coverage trigger for property damage claims is injury in fact: when the actual injury or damage occurs. The prior trigger was when the damage manifested itself and was fairly easy to apply. Determining when the actual damage occurred is more difficult.

Damage typically has been going on for some time before anyone discovers that there is a problem; think about a leaking pipe behind a wall. Determining when it occurred is necessarily expert-driven and requires investigation and analysis. Even then, the expert only can offer a guess or opinion. In the battle of experts the burden of proof again will be on the insured. Those expert opinions must survive judicial scrutiny, and lawyers can expect to see expert challenges as a major battleground in this area.

There are obviously some significant obligations imposed on an insured who seeks to obtain coverage and payment for damages on liability claims. The change in the landscape over the past couple of years has created more opportunities for insureds, but it also has significantly increased the expense to the insured. ■■■

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