DEFENSE IS OWED BY CGL INSURER FOR LOSS OF USE AND DIMINISHED VALUE RESULTING FROM ALLEGED EASEMENT TRESPASS

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The U.S. Court of Appeals for the Tenth Circuit recently held in *KF 103-CV v. American Family Mut. Ins. Co.*[1] that a general liability insurer owed a defense to a real estate developer who allegedly trespassed on nearby easements, causing a loss of use of those easements and a diminution in value to the dominant property. The decision illustrates the expansive defense coverage owed under ordinary general liability insurance, with coverage extending to claims alleging only a loss of use or property value.

Background

KF 103 arose from a dispute over easements adjacent to one of KF 103's residential developments. As part of its development work, KF 103 undertook improvements to an intersection. Those improvements allegedly interfered with easements held by neighboring land owners. KF 103 completed the improvements and bought a quiet title action to relocate the neighbors' easements. The court denied the relocation and ordered KF 103 to restore the disturbed easement. In its ruling, the court characterized KF 103's conduct as "trespass," and invited the affected neighbors to file counterclaims against KF 103.

Counterclaims were filed against KF 103 in 2011 and 2012. Both waves of claims were tendered to KF 103's general liability insurer, American Family Mut. Ins. Co. ("American Family"), for a defense. American Family denied all of the tenders. KF 103 sued American Family for breach of contract and bad faith. The parties briefed the duty to defend issue and summary judgment was awarded to American Family. KF 103 appealed.

Holding on Appeal

On appeal, the Tenth Circuit reversed, finding that the district court improperly considered the court's quiet title rulings as a basis for finding no duty to defend. However, under Colorado law, as in many other states, an insurer's duty to defend is to be determined solely on the allegations contained in the complaint against the insured. Colorado courts have articulated several policy reasons to justify this "complaint rule," including an interest in protecting the insured's reasonable expectation that it will not have to pay to defend allegations that are facially within the terms of coverage. The rule places a heavy burden on the insurer, rather than the insured, to shoulder the uncertainty of what the underlying litigation might reveal. Thus, where claims against the insured are even only "potentially or arguably" within coverage, the insurer must defend.

Against this backdrop, the Tenth Circuit analyzed whether the underlying allegations triggered a defense. First, the court found that the allegations alleged an "occurrence" under the policy. The policy defined an "occurrence" in typical fashion as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The court noted that the policy does not further define "accident," but it does exclude damage "expected or intended from the standpoint of the insured." "Expected or intended" damages, the court explained, are only those damages that the insured either intended or knew would flow directly and immediately from its intentional act. The court further explained that it is not enough that an insured was warned that damages might ensue from its actions or that once warned an insured decided to take a calculated risk. Thus, the court concluded that a volitional act that leads to foreseeable but unintended damages will not always fall within the "expected or intended" exclusion.

The court concluded that four of the neighbors' counterclaims alleged an "occurrence." The court found that even though the alleged "trespass" is an intentional tort under Colorado law, where the trespasser's intentional acts result in unintended or unanticipated damage to property, the actor may be guilty of trespass but may not have "expected or intended" the damages for purposes of coverage. The court found that the district court failed to recognize this distinction and was wrong in its determination that a finding of trespass necessarily bars a duty to defend.

The court next determined whether the neighbors' counterclaims alleged "property damage" as a consequence of the "occurrences." The policy defined "property damage" as, among other things, a "[l]oss of use of tangible property that is not physically injured." The court recognized that easements are generally not considered tangible property. Thus, the court agreed with the district court's ruling that damage to the easements themselves cannot constitute "property damage" under the policy. However, the court concluded that the district court failed to consider whether infringement on the easement resulted in a loss of use of the neighbors' tangible property. Further, the court explained, loss of use of property should be broadly read to include any diminution in value of the affected property.

The court found that the four counterclaims also sufficiently alleged "property damage." One counterclaim, the court explained, alleged "damages for diminutive property value due to 'the intersection modifications.' " Another of the counterclaims alleged that the value of her property had been "greatly diminished." Another counterclaim alleged "'damages for loss of safe, reasonable access' to their properties." The court found this statement to arguably allege a loss of use of the property. Finally, the court found that allegations of "the temporary . . . loss of safe, uninhabited access" to property also arguably alleged "property damage" under the policy. Based on these allegations, the court concluded that a defense had in fact been triggered.

Implications

KF 103 is illustrative of the broad defense coverage owed under ordinary general liability insurance policies. The decision provides a unique illustration of how that defense can be implicated even where the claims against the insured allege no physical injury to third-party property. As in *KF 103*, the mere diminution in value of the affected property was enough to trigger a defense. Likewise, the alleged loss of use of the affected property, even without an alleged loss of value, was sufficient to trigger a defense. Policyholders and additional insureds alike should therefore remain cognizant of the broad defense coverage that might be available to them and consider whether any allegations against them merely "potentially or arguably" come within the scope of coverage when the need for a defense is on the line.

Note

[1] No. 14-1403 (10th Cir. Oct. 29, 2015).

About the Author

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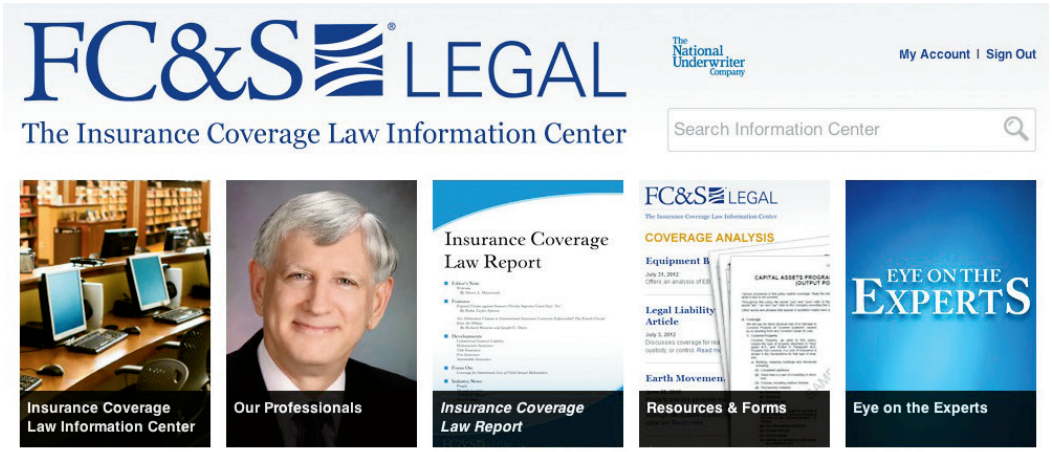

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