

New York Insurance Law: Under Construction

Risk and Recovery Blog on **March 30, 2018**

Imagine you hired a general contractor to renovate the master bathroom of your home. The general contractor hired a subcontractor to do the plumbing work, but the subcontractor botched the job, resulting in a massive leak causing extensive damage to other areas of your home and valuable personal property. You demand full compensation for the loss, but unfortunately the contractors you hired had no assets besides their comprehensive general liability insurance policies.

Will those insurance policies cover this loss?

Until now, New York courts may well have answered this question in the negative, because they did not consider a subcontractor's defective workmanship to qualify as an "occurrence" under CGL policies. But that view may be changing.

Recently, a number of cases in courts around the country have taken a fresh look at coverage in this scenario and reached the opposite conclusion. In 2016, the New Jersey Supreme Court changed its previous position and decided that under current CGL policies, damages caused by a subcontractor are a covered "occurrence" and therefore insurable.

More recently, in February 2018, the United States Court of Appeals for the Tenth Circuit, applying New York law, predicted that if the question were presented today, New York would find a potential for coverage even though prior intermediate appellate decisions in New York went the other way.

The issue in the Tenth Circuit case was whether a general contractor could recover for property damage caused by their subcontractor's faulty installation of a component in a coal-fired power plant. The contractor settled claims brought by the owner for \$225 million, and sued its CGL carrier for coverage. The insurers argued that subcontractor-caused damage was not an "occurrence" under New York law, but the contractor argued that position was outdated.

Although the insurers convinced a district court judge to dismiss the case based on prior New York authority, the Tenth Circuit reversed, predicting that the New York Court of Appeals would find coverage if the question were presented today. The Tenth Circuit reached this conclusion based on a comprehensive study of changes in the CGL policy, which showed that the policy form had been modified specifically to recognize coverage for damages caused by a subcontractor's defective construction work, and that it would be contrary to the intent of the policy to deny coverage due to the absence of an "occurrence."

It is too soon to tell whether the Tenth Circuit's prediction will prove correct. But its decision follows a trend of court decisions over the past several years which have found coverage in these circumstances. In addition, recent decisions of New York's highest court have focused on the precise policy wording and insisted that effect be given to every provision in an insurance contract, in line with the Tenth Circuit's reasoning.

This is not the last we will hear from the courts on this evolving issue. Stay tuned for further developments. In the meantime, however, New York policyholders should not assume that there is no coverage for property damage caused by a subcontractor under a CGL policy and should take appropriate action to preserve coverage such as giving timely notice of occurrences or claims and assessing their litigation options.

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