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Connecticut Supreme Court Finds Duty to Defend When Case Law is Uncertain

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The Connecticut Supreme Court recently addressed whether an insurer has a duty to defend when faced with legal uncertainty as to whether coverage is owed: for example, when there is no Connecticut case law on point, and courts outside of the state have reached conflicting decisions.

The Court suggested that an insurer, in these circumstances, should defend the insured, and should seek a declaratory judgment from a court as to whether coverage is owed.

The issue in *Nash St., LLC v. Main St. Am. Assurance Co.*,[1] arose out of a home collapse in Milford, Connecticut. The owner of the home (Nash) hired a contractor (New Beginnings) to renovate the home. New Beginnings, in turn, retained a subcontractor to lift the house and to do concrete work on the foundation. While the subcontractor was lifting the house, the house shifted off the supporting cribbing and collapsed.

Nash sued New Beginnings, which tendered to its insurer (Main Street), which denied coverage. Main Street based its coverage denial on two exclusions in its policy. The first exclusion barred coverage for property damage to "[t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the 'property damage' arises out of those operations . . . .". The second exclusion barred coverage for property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it."[2]

Following Main Street's refusal to defend, Nash obtained a default judgment against New Beginnings. When the judgment went unsatisfied, Nash brought a lawsuit against Main Street directly. The trial court – agreeing with Main Street's position – found the exclusions barred any duty to defend. But, on appeal, the Connecticut Supreme Court reversed, and found a duty to defend had been owed.

In so ruling, the Court made clear that it was not opining on whether the exclusions actually precluded coverage. Indeed, the Court stated that it was not required "to determine conclusively what those exclusions mean." Instead, the Court noted that New Beginnings' tender gave rise to uncertainty as to coverage under Connecticut law; and it said this legal uncertainty was sufficient to trigger Main Street's duty to defend.

Discussing the issue further, the Court noted that uncertainties as to coverage can be either factual or legal. A factual uncertainty exists when it is unclear from the face of a complaint whether the allegations fall within coverage. A legal uncertainty commonly occurs when policy language is ambiguous in application to the specific factual scenario at issue. But, extending this principle, the Court found legal uncertainty also exists in a second scenario: when there is a split of

authority in other jurisdictions as to the meaning of a particular policy provision, and there is no relevant appellate authority within Connecticut.

This case presented a legal uncertainty of this type:

- In some states, such as Massachusetts, courts broadly construe the phrase "that particular part," finding – in the case of a general contractor – that it refers to an entire structure the insured is working on, and bars coverage for damage to any part of that structure.
- In other states, courts construe the exclusion more narrowly. In these states, a court might find, for example, that the phrase "that particular part" only referred only to the foundation the subcontractor was hired to repair, and did not refer to (or bar coverage for damage to) the other parts of the home that was being lifted.

Faced with this split of authority – and absent any Connecticut appellate authority on point – the court found a legal uncertainty as to the applicability of these exclusions, and concluded that Main Street was required to defend New Beginnings.

In the future, the Court suggested, insurers faced with a legal uncertainty of this type should consider offering defense under reservation of rights, and pursuing a declaratory judgment action to try to resolve the proper construction of the disputed policy language.

If you have questions or would like more information, please contact Eric B. Hermanson (hermansone@whiteandwilliams.com; 617.748.5226), Austin Moody (moodya@whiteandwiliams.com; 617.748.5206) or another member of the Insurance Coverage and Bad Faith Group.

[1] No. 20389, 2020 Conn. LEXIS 197 (Sep. 1, 2020).

[2] Under the standard CGL Policy, these are exclusions j (5) and (6). However, under this policy, they were exclusions k (5) and (6).