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Insured's Allegations In Suit Against Contractors Deemed Admissions Precluding First-Party Coverage

By Samuel H. Ruby

It is not uncommon in the construction defect arena to see insureds sue the contractors responsible for defective construction, and also tender a claim to the first-party insurer for coverage of losses associated with the construction problems. A recent opinion by the California Court of Appeal reminds insurers that their insureds' allegations in other litigation may be relevant to coverage issues. The recent decision in *O&S Holdings LLC et al. v. Fireman's Fund Ins. Co. et al.*, 2012 WL 5193783 (Cal. Ct. App., 2d Dist. Oct. 22, 2012) is instructive.

In *O&S Holdings*, the insured sued contractors alleging damage to a hotel complex they built was caused by defective work and materials. The insured also sued its first-party insurers for breach of contract and bad faith for denying coverage. The insurers had denied coverage based on construction defect exclusions.

The court granted the insurers summary judgment because it said the insured was bound by the construction defect allegations it made in its case against the contractors. "The trial court did not err in denying a continuance or in granting summary judgment because O&S Holdings was bound by the unequivocal admissions in its complaint [in the construction defect lawsuit]."

Insurers should take into account any judicial admissions made by the insured when coverage is sought for losses related to construction defects. There may be times where the insured's admission of fact in a pleading from a separate lawsuit may act as a judicial admission in the coverage action.