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Insurer May Owe Duty to Defend Where Date of Property Damage is Not Specified in Underlying Complaint

By Ronald J. Clark

On the last day of 2012, the Oregon Supreme Court issued an opinion that reminds carriers the duty to defend will continue to be robust in the new year. In *Bresee Homes, Inc. v. Farmers Ins. Exch.*, Case No. S057573 (December 31, 2012), the Court held that because the date of alleged "property damage" was not expressly pled in the underlying lawsuit, the carrier owed a duty to defend despite the apparent application of the "products-completed operation hazard" exclusion.

The facts of the *Bresee* case are not unusual. A contractor was sued for his allegedly defective work on the claimant's home. The contractor tendered the claim to his commercial general liability carrier. The carrier disclaimed coverage on the basis of a policy endorsement that excluded coverage for "property damage" included within the "products-completed operations hazard."

The opinion is significant because of the way it analyzed the underlying complaint's allegations. The underlying lawsuit was filed six years after the contractor had completed his work, and the allegations appeared to indicate—without expressly stating—that the damage occurred after the contractor completed his work. In response to the carrier's motion for summary judgment, the insured contractor presented no contradictory evidence that the claimed damage had occurred before the contractor had completed his work.

Although the carrier presented undisputed evidence that the alleged damages occurred after the contractor completed his work—and therefore were excluded by the "products-completed operation hazard" endorsement—the Court confined its analysis to the underlying complaint and policy only. The Court held that the carrier's disclaimer of coverage was in error because it relied on facts concerning the completion of the contractor's work that were not alleged in the underlying complaint. The factual question of whether the claimed damages had occurred before or after the completion of the contractor's work was an issue that the underlying litigation might determine, and, once established, could affect the carrier's duty to indemnify. However, the court held that "[t]he potential factual determinations in [the underlying litigation] are not the facts that governed [the carrier's] duty to defend [the insured]. When [the insured] tendered the [underlying claim], only the facts alleged by the [claimant] and the terms of the policy governed [the carrier's] duty to provide a defense."

The carrier argued there is authority in Oregon law which holds that "compelling evidence of no coverage" outside the complaint will nullify a duty to defend. See *Casey v. N.W. Security Ins. Co.*, 260 Or 485, 490 P2d 208 (1971). The Court acknowledged that authority, but labeled it a "narrow" qualification and distinguished the facts of the present case because "[t]his case involves no court determination that precludes coverage like the criminal court adjudication considered in *Casey*. This court has consistently focused its analysis on the policy and the underlying complaint."

The *Bresee* Court's "narrow" application of the "compelling evidence of no coverage" outside the complaint can be confined to the facts of this case. Oregon law prohibits an insurer from placing the insured in the "conflictive position" of being required to abandon a denial of liability in the underlying litigation in order to come within the policy's scope of coverage in a separate declaratory judgment action. See *North Pacific Ins. Co. v. Wilson's Distributing*, 138 Or App 166, 174, 908 P2d 827 (1995). In order for the insured to contradict the carrier's evidence that "property damage" occurred after the contractor completed his work, the contractor may have



been forced into the "conflictive position" while he was still defending against the underlying lawsuit. However, *Bresee* should not prohibit a carrier from presenting "compelling evidence of no coverage" in different scenarios where the evidence of no coverage does not prejudice the insured's attempts to defend in the underlying litigation.

Finally, the Court declined to rule on the question of indemnity, because "whether [the carrier] has a duty to pay must be determined on the basis of the ultimate facts proven at trial or, as in this case, the facts that formed the basis for the settlement. We cannot determine, from the record made below, whether the policy affords a basis for indemnification."

Several *amicus* briefs were filed in the case, including briefs by the Oregon Trial Lawyers Association and the Oregon Home Builders Association. The *Bresee* case can be found [here](#).