UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Trinity Homes LLC and Beazer Homes Investments, LLC v. Ohio Casualty Insurance Company and Cincinnati Insurance Company

629 F.3d 653 (7th Cir. 2010) · No. 09-3613 · Decided December 22, 2010

SUMMARY

The Seventh Circuit held that Indiana law may provide coverage under a standard commercial general liability policy for damage to homes caused by faulty subcontractor workmanship, subject to applicable exclusions and limitations. The court also held that an umbrella policy was ambiguous regarding whether underlying coverage could be exhausted through settlements in which the insured paid the remaining policy limits. The court reversed summary judgment for both insurers and remanded for further proceedings.

CASE DETAILS

COURT	United States Court of Appeals for the Seventh Circuit
WRITING FOR THE COURT	KANNE, Circuit Judge; Richard D. Cudahy, Circuit Judge; Michael S. Kanne, Circuit Judge; John W. Darrah, District Judge sitting by designation
JURISDICTION	Federal
DECIDED	December 22, 2010
DOCKET	09-3613
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Beazer brought a diversity action seeking damages for breach of insurance contracts and a declaration that Ohio Casualty and Cincinnati Insurance had duties to provide coverage for liability arising from defective subcontractor work. On cross-motions for summary judgment, the United States District Court for the Southern District of Indiana entered judgment for both insurers. Beazer appealed.
STANDARD OF REVIEW	The court reviewed the grants of summary judgment and the construction of the insurance policies de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.
PRECEDENTIAL VALUE	published precedential federal appellate opinion

PARTIES	Trinity Homes LLC, Beazer Homes Investments, LLC v. Ohio Casualty Insurance Company, Cincinnati Insurance Company

TOPICS

construction defects · insurance coverage · duty to indemnify · contract interpretation · standard of review

PRACTICE AREAS

insurance · construction law · commercial litigation · contracts

QUESTIONS PRESENTED

1. Whether damage to homes caused by faulty subcontractor work constitutes property damage caused by an occurrence under Ohio Casualty's standard CGL policy.
2. Whether Cincinnati's umbrella policy requires the full underlying policy limits to be paid by the primary insurers before coverage is triggered.
3. Whether a settlement in which the primary insurer pays a substantial portion of the policy limit and the insured pays the remainder can functionally exhaust underlying coverage.
4. Whether Beazer presented sufficient evidence to create a genuine issue of material fact regarding the unavailability of the applicable CGL policies.

HOLDINGS

1. Under Indiana law, a standard CGL policy covers damage to a home's structure resulting from faulty subcontractor workmanship unless the subcontractor work was intentionally faulty.
2. Cincinnati's umbrella policy did not clearly require the primary insurers themselves to pay the full underlying policy limits before umbrella coverage could be triggered; the policy was ambiguous on that point and had to be construed in favor of the insured.
3. Only additional insurance policies applicable to the occurrence qualify as underlying insurance under Cincinnati's umbrella policy; not every policy held by Beazer must be unavailable.
4. Beazer's declaration from its Vice President of Risk Management was sufficient to create at least a genuine issue of material fact concerning whether the FCCI and American Employers policies were unavailable.

KEY QUOTATIONS

> *"a standard CGL policy does cover damage to a home's structure resulting from shoddy subcontractor work unless the subcontractor work was intentionally faulty."* (657)

> *"The umbrella policy is clear only insofar as it requires that the underlying CGL coverage be unavailable—either by exhaustion or denial of coverage—before Cincinnati's coverage is triggered."* (658)

> *"As such, the policy is ambiguous and susceptible to the meaning put forth by Beazer—that a CGL policy can be exhausted when an insured and a CGL insurer enter into a settlement agreement where the primary insurer*

> *will pay a large percentage of the total limit and the insured takes responsibility for the remainder.”* (659)

> *“If based on personal knowledge or firsthand experience, such testimony can be evidence of disputed material facts.”* (660)

FACTUAL BACKGROUND

Trinity Homes and Beazer Homes acted as general contractors for numerous Indiana residences and used subcontractors to perform the construction. Faulty subcontractor work caused structural defects, water intrusion, physical damage to homes, and health problems for occupants, resulting in thirteen underlying lawsuits against Beazer. Beazer sought coverage under primary CGL policies and a Cincinnati umbrella policy; most primary insurers settled for at least 75 percent of their policy limits, while Ohio Casualty and Cincinnati denied coverage.

PROCEDURAL HISTORY

Beazer faced thirteen Indiana lawsuits alleging defective construction of homes built by its subcontractors and sought coverage under primary CGL policies and a Cincinnati umbrella policy. Most primary insurers settled, while Ohio Casualty and Cincinnati denied coverage. The district court granted summary judgment to Ohio Casualty on the ground that faulty subcontractor work was not covered property damage caused by an occurrence, and to Cincinnati on the ground that the underlying policies were not unavailable. The Seventh Circuit reversed both grants and remanded.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The district court was directed to reconsider Ohio Casualty's summary judgment in light of Sheehan and to conduct further proceedings concerning Cincinnati's policy. The district court was left to address any applicable exclusions, limitations, or other state-law doctrines, and the unresolved application of exclusions or limitations under Cincinnati's policy.

CASES CITED

- Ace Am. Ins. Co. v. RC2 Corp., 600 F.3d 763, 766 (7th Cir. 2010)
- Abstract & Title Guar. Co. v. Chicago Ins. Co., 489 F.3d 808, 810 (7th Cir. 2007)
- Clark v. State Farm Mut. Auto. Ins. Co., 473 F.3d 708, 712 (7th Cir. 2007)
- Tate v. Secura Ins., 587 N.E.2d 665, 668 (Ind. 1992)
- Reuille v. E.E. Brandenberger Constr., Inc., 888 N.E.2d 770, 771 (Ind. 2008)
- Sheehan Constr. Co. v. Cont'l Cas. Co., 908 N.E.2d 305 (Ind. Ct. App. 2009)
- Sheehan Constr. Co. v. Cont'l Cas. Co., 935 N.E.2d 160, 170 (Ind. 2010)
- Comerica Inc. v. Zurich Am. Ins. Co., 498 F. Supp. 2d 1019, 1022 (E.D. Mich. 2007)

- Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London, 161 Cal. App. 4th 184, 73 Cal. Rptr. 3d 770, 778 (2008)
- Zeig v. Mass. Bonding & Ins. Co., 23 F.2d 665, 666 (2d Cir. 1928)
- Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1454 (3d Cir. 1996)
- Midwest Mut. Ins. Co. v. Ind. Ins. Co., 412 N.E.2d 84, 89 (Ind. Ct. App. 1980)
- Berry v. Chicago Transit Auth., 618 F.3d 688, 691 (7th Cir. 2010)

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