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INSURANCE RECOVERY GROUP NEWS

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Supreme Court Allows Insurers to Seek a Declaration Allocating Defense Costs to Fellow Insurers

On Monday, the Connecticut Supreme Court concluded that insurers can bring declaratory judgment suits over fellow insurers' coverage obligations. The dispute in Travelers Cas. & Surety Co., et al. v. Netherlands Ins. Co., et al. arose out of the construction of the University of Connecticut law library. Following the completion of the project, the State of Connecticut began experiencing problems with water intrusion and expended more than $15 million in corrective costs. The State brought suit against Lombardo Brothers Mason Contractors, Inc., among many others, alleging defects in the design and construction.

One of Lombardo's insurers, Travelers, agreed to participate in the investigation and defense of the State's claim against Lombardo and ultimately spent over $482,855 defending Lombardo. Travelers then sued two other Lombardo insurers, seeking among other relief, a declaratory judgment that the other insurers were obligated to pay their pro rata shares of the cost of the defense. Netherlands Insurance Company to move to dismiss the case for lack of subject matter jurisdiction. Netherlands argued that Travelers had no standing to seek a declaratory judgment against fellow insurers and that the factual allegations either did not constitute an occurrence, or fell within the prior known defect exclusion. The trial court denied Netherlands' motion to dismiss and the Connecticut Supreme Court affirmed the judgment of the trial court.

- *Insurers have standing to seek a declaratory judgment against fellow insurers.*

The Supreme Court held, as an issue of first impression, that insurers have standing to seek a declaratory judgment action as to fellow insurers' coverage obligations. The Court first observed that Connecticut law requires the plaintiff in the declaratory judgment action to have an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the plaintiff's rights. Recognizing a split in authority in other jurisdictions, the Court followed the "vast majority of federal and sister state authorities that have considered this question, which support the leading commentators' view that it is 'properly within the competent authority of a court to hear [an action for] declaratory judgment . . . relating to the rights and obligations of two insurance companies as to the coverage of their respective policies, where the pleadings embrace and present this ultimate and controlling issue.'"

- *The underlying factual allegations constituted an occurrence.*

The Supreme Court addressed Netherlands' claims that the trial court improperly concluded that the

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factual allegations in the underlying complaint constituted an occurrence and that the "prior known occurrences" exclusion did not preclude coverage. Netherlands argued that a fair and comprehensive reading of the underlying complaint demonstrated that the property damage manifested prior to the inception of its policies in 2000 and that the alleged "water intrusion" would constitute a single occurrence which predated its time on the risk. Travelers responded that the property damage was caused by the continuing and progressive water intrusion that commenced after January 31, 1996 and was not the subject of repair work until February 14, 2008. Travelers further argued that the Netherlands' policies do not require that the occurrence happen during the periods they cover; they require only that resulting "property damage" occur during those periods.

The Court agreed with Travelers and held that the broadly worded underlying complaint alleged property damage within Netherlands' policy period. In so doing, the Court reaffirmed well established Connecticut law that requires insurers to defend their policyholders if the underlying complaint could "even possibly" be construed to provide coverage. The Court similarly held that Netherlands' exclusion for prior known losses did not bar coverage for purposes of the duty to defend. Considering only the factual allegations contained in the "four corners" of the underlying complaint, the Court found that those allegations did not identify when Lombardo learned of the water problem. Absent a clear allegation, there was a possibility that Lombardo did not know of the loss prior to the inception of the policy and therefore Netherlands had a duty to defend.

The lesson for all policyholders is that when disputes arise, your insurance policies are valuable assets. You should give prompt notice to each insurer as to all policies that could potentially be implicated. If you have any questions, do not hesitate to reach out to a member of Murtha Cullina's Insurance Recovery or Construction Law Practice Groups.