

California Appellate Court Reverses Trial Court and Confirms Insurer's Duty to Defend Additional-Insured General Contractor, Despite Seemingly Broad Exclusion

Last month, a California appellate court reversed the trial court and ruled that a subcontractor's insurer had a duty to defend an additional-insured general contractor in underlying construction-defect litigation.

In *McMillin Homes Construction, Inc. v. National Fire & Marine Insurance Company* (2019) 35 Cal.App.5th 1042, a general contractor was an additional insured under a commercial general liability policy issued to its roofing subcontractor. When homeowners sued the general contractor in San Diego County for alleged water intrusion and damage from defects in the roofing, the insurer refused to defend. The insurer argued that coverage was barred by a policy exclusion that precluded coverage for property damage that occurred when the "property was in the care, custody or control of the additional insured"—i.e., the general contractor.

After a bench trial, the trial court held that the insurer did not owe a defense to the general contractor, concluding that the exclusion applied even where the additional insured did not exercise exclusive or complete control over the property.

But the appellate court reversed, holding that the insurer owed a defense because the general contractor had demonstrated the potential for coverage, notwithstanding the care-custody-or-control exclusion. The appellate court explained that to be excused from the duty to defend under the care-custody-or-control exclusion, the insurer had the burden of demonstrating "exclusive or complete" control by the additional insured, despite the insurer's argument that requiring "exclusive or complete" control would improperly insert words into an unambiguous policy provision.

To evaluate whether the general contractor had "exclusive or complete" control, the court applied a fact-intensive analysis. Though the general contractor was responsible for the overall project and coordination, the roofing subcontractor oversaw management of its jobsite and supervised the roofing work. Based on those facts, the parties shared control. And since the insurer failed to show that the damage could not have occurred during the period of shared control, there was a potential for coverage, and the insurer owed the general contractor a duty to



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defend.

While *McMillin* purports to be the first California case to address this care-custody-or-control exclusion, it reinforces established California law regarding insurers' broad duty to defend whenever there is the potential for coverage.

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