Ruling Affects Additional Insured Coverage for Public Entities

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The California Court of Appeal delivers a surprising warning to any party who contracts for additional insured coverage. In *Forecast Homes, Inc. v. Steadfast Insurance Company* 2010 Cal.App.LEXIS 172 *1 (Cal.App. 4th Dist. Jan. 12, 2010), the court ruled that the clear insurance policy language permitted only the named insured to pay or exhaust the self-insured retention before the insurer responded to a covered loss. In that case, a housing developer had tendered the defense of construction defect lawsuits to its subcontractors pursuant to subcontracts that required additional insured coverage for the developer on the subs' commercial general liability policies. The court determined that the developer could not obtain the additional insured coverage because the insurance policies expressly conditioned such coverage on the named insured, here the subs, exhausting the self-insured retention ("SIR"), which they had not done.

Steps Public Entities Can Take To Avoid Pitfalls Of Restrictive Retention Language

Public entities routinely require additional insured coverage from their contractors, vendors, and service providers. Restrictive language requiring only the named insured to pay the self-insured retention is becoming more prevalent in insurance policies. Thus, the *Forecast Homes* decision presents challenges for public entities listed as additional insureds on insurance policies to secure this coverage. We discuss below some approaches public entities can take to avoid the results of *Forecast Homes.*

1. Contractually require contractors to obtain insurance policies that allow the additional insureds to pay SIRs or deductibles. Public entities may also want to require contractors to ensure that any subcontractor they hire also obtains policies allowing additional insureds to pay an SIR or deductible. This solution is not foolproof because a contractor may fail to include the required language in its insurance policy. Under these circumstances, however, a public entity will have a breach of contract claim against the contractor for failure to procure a policy with the specified coverage.

2. Require contractors to supply copies of their policies prior to entering into a contract. The public entity could then review the additional insured provisions to ensure that they do not state that the SIR may only be paid by the named insured. However, this solution may be impractical and resource intensive. It will require the agency employee to have expertise in insurance, and there is no guarantee the employee will interpret the provision in line with an insurer or a court. Also, a project contract may span more than one policy period during which time the policy may be replaced or changed and each subsequent policy would require review to detect any changes in coverage.

3. Obtain and review potentially applicable insurance policies as soon as the public entity receives a claim and immediately tender claims to insurers under all potentially applicable policies. If one or more policy contains language only allowing the named insured to pay the SIR, public entities should request that the named insureds make necessary payments to satisfy the SIR. Further, as a practical matter, public entities typically cross-claim against contractors when sued for problems arising out of the contract. Thus, perhaps the easiest solution to resolving the dilemma in *Forecast Homes* is for public entities to cross-claim against the contractors, forcing them to defend and incur defense costs, thereby satisfying the SIR or deductible payment restriction.

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