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Insurer Has Duty To Defend Insured Served With Calderon Notice

On July 27, 2010, the Fourth Appellate District filed its opinion in *Clarendon America Ins. Co. v. StarNet Ins. Co.*, 186 Cal. App. 4th 1397, holding that the construction defect resolution process established by the Calderon Act is a suit which triggers a duty to defend under a standard commercial general liability policy.

Factual and Procedural Background

Centex Homes developed a residential complex known as Westwood Ranch. The homeowners association served on Centex a notice of commencement of legal proceedings pursuant to Civil Code section 1375 (Calderon Notice) alleging construction defects at the site. WSM Transportation dba Sam Hill & Sons, a subcontractor, was insured by StarNet whose policies provided StarNet would pay the sums Sam Hill is legally obligated to pay as damages because of property damage and defend any suit seeking such damages. "Suit" was defined as "a civil proceeding in which damages because of . . . property damage . . . to which this insurance applies are alleged" and included arbitration proceedings in which such damages are claimed, or "any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with [the insurer's] consent." Centex was an additional insured under the StarNet policies. It was also an additional insured under a Clarendon policy issued to another subcontractor, Ebensteiner Company.

Centex filed a complaint against Clarendon for payment of fees and costs incurred in defending the Calderon Notice. Clarendon filed a cross-complaint against the additional insurers, including StarNet, seeking a declaration they were obligated to provide Centex a defense and/or coverage. In its amended complaint, Clarendon sought indemnity, declaratory relief and contribution from the additional insurers. It reached settlement with all insurers except StarNet.

StarNet moved for summary judgment asserting the Calderon Notice and Process did not constitute a "suit" within the meaning of its policies. The trial court denied the motion. The Court of Appeal affirmed the judgment holding the provision in a CGL policy requiring the insurer to defend against any suit seeking damages includes the duty to defend the insured in proceedings under the Calderon Act.

Judicial Holding and Analysis

The Calderon Act requires common interest development associations to give notice to a builder, developer, or general contractor of construction or design defects before suing. The purpose of the Act is to encourage settlement of construction and design defect disputes and to discourage unnecessary litigation. An association must comply with all Calderon Act requirements before



bringing suit. The Act requires a facilitated dispute resolution of the claim with all parties and insurers. If the dispute resolution does not settle the claim, the association may file a complaint which is deemed filed on the date of service of the Calderon Notice.

Clarendon argued the Calderon Process is a suit because it is a civil proceeding alleging damages to which the insurance applies. StarNet argued it is not a suit because it cannot result in a party being legally obligated to pay damages. The court determined that defined as “a civil proceeding,” a suit is broader than an action or lawsuit initiated by a complaint filed in court. The term “civil proceeding” encompasses the Calderon Process because it is a proceeding created by the Civil Code that is required before an association may file a complaint. The Process begins with a notice, and during its course, inspections and document exchanges are conducted; visual inspections and invasive tests are conducted; a document depository is created; and the association must provide a demand providing sufficient detail for the parties to engage in meaningful dispute resolution.

The court further determined that the Calderon Process is a civil proceeding in which damages are alleged. The Process, which is mandatory, is one part-the first step-in a continuous litigation process. It is tied directly to an association’s complaint which is deemed to have been filed on the date of service of the Calderon Notice. The procedures undertaken during, and the results of the Process, are incorporated into, and become part of, the post complaint litigation. Parties are prohibited from engaging in additional inspection or testing unless certain conditions are met, and the amount of any settlement reached in the facilitated dispute resolution is binding on parties who failed to attend the facilitated dispute resolution or attended without settlement authority.

“The Calderon Process is more than a pre-litigation alternative dispute resolution requirement: It is part and parcel of construction or design defect litigation initiated by the association and, as such, cannot be divorced from a subsequent complaint.” Thus, the court concluded StarNet had a duty to defend its insured in the Calderon Process.

Comments and Implications

In *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal. 4th 857, the court concluded a “suit” was “a court proceeding initiated by the filing of a complaint,” and therefore National Union had no duty to defend its insured in a proceeding conducted before an administrative agency. *Clarendon* distinguished *Foster-Gardner* on the ground the policies in that case predated the StarNet policies and did not define the word “suit.” In 1986, the standard form was amended to define “suit” as a “civil proceeding in which damages . . . to which this insurance applies are alleged.” In 1988, the definition was expanded to cover alternative dispute resolution to encourage its use.