

InsuranceNewsNet: N.Y. case may set commercial insurers precedent

Leaky windows in a mixed-use building in Manhattan's East Village led to a protracted 12-year lawsuit that may have scored a precedent-setting win for policyholders challenging commercial insurers over coverage even before the case is resolved.

Utica Mutual Insurance Co. and Utica National Assurance Co. had asked New York's Supreme Court for a pre-emptive declaratory judgment of the dispute brought by the window company, Crystal Window and Door System LTD., claiming it had no duty to indemnify Crystal for any judgment or settlement in the construction-related property damage action. Utica, however, did not prevail, and then some.

The court not only dismissed Utica's insurers' "premature" request for summary judgment, but also awarded attorneys' fees to Utica based on a New York rule that an insurer's duty to defend its policyholders extends to "any action" arising out of a claim or occurrence, "including a defense against an insurer's declaratory-judgment action." In other words, Utica not only has to pay for Crystal's defense against the building's owner but also pay the attorney fees and court costs that it incurred by having been sued by the insurer.

A first for commercial insurers

Court watchers said it appears this is the first case in New York in which a commercial insurer's duty to defend a policyholder in a legal action exists even if it is the insurer who is suing the policyholder. Previous cases had found that a policyholder who successfully files a coverage action against its own

insurer could not recover attorney fees, although they would be able to recover fees if it successfully defended the insurer's coverage action.

The lawyers for Crystal, Keith McKenna and Chelsea Ireland of Cohen Ziffer Frenchman & McKenna, argued that those legal decisions were made in error and asked the court to dismiss Utica's request for summary judgement since the underlying case was ongoing and no settlement or judgement had been entered. Utica argued that certain exclusions in the insurance policy governing "Your Work" and "Your Product" precluded coverage as a matter of law. Crystal opposed Utica's motion and further argued that, because Utica does not dispute its duty to defend Crystal, Crystal is entitled to an award of the attorneys' fees that it incurs.

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