FIRST DISTRICT APPELLATE COURT UPHOLDS INTENTIONAL ACT EXCLUSION TO DENY COVERAGE WHERE EXCAVATION CAUSES PROPERTY DAMAGE TO ADJOINING LANDOWNER

In an unpublished Supreme Court Rule 23 Opinion, the First District Illinois Appellate Court upheld Judge Patrick McGann's entry of judgment on the pleadings in favor of Allstate and against its insured, John Willis. The Appellate Court case is captioned *Allstate v. Willis*, Docket # 1-05-4105).

In this case, a landowner filed a property damage suit under multiple theories of liability, including the Adjacent Landowners Excavation Protection Act, when a developer allegedly rejected the specific advice of his excavator, and refused to install reinforced shoring. Thereafter, a portion of his excavation caved in, which resulted in not only third party property damage, but loss of business income, and additional living and business expenses incurred by the underlying plaintiff well into the mid six figures. The developer tendered his defense to his owner's landlord and tenant (OLT) insurance carrier.

The OLT insurance carrier retained us to filed a declaratory judgment action against its insured, arguing that it had no duty to defend or indemnify the developer because the evidence showed that the developer directed his excavator to use "cheaper", unbraced shoring excavator even though the excavator had warned the developer that this property damage would result if it were used. As a result, the developer's direction to his excavator was an intentional act, which precluded those acts from insurance coverage. The trial court agreed, holding that our client did not have a duty to defend or indemnify its insured.

The First District upheld and applied the rule of law first applied in its decision in *Atlantic Mutual Ins. Co. v. American Academy of Orthopedic Surgeons*, 315 Ill. App. 3d 552, 556 (1st Dist. 2000). There, the First District held that a court cannot ignore the actual conduct of the insured alleged in the underlying complaint, even when the complaint contains one claim that does not constitute an intentional act. In both *American Academy* and this case, the insured was were alleged to be negligent in committing certain acts of conspiracy to set prices and in ignoring the advice of the expert excavator and choosing to use inferior protection against anticipated property damages, respectively.

This is a significant victory for the insurer because it means that an insurer is not precluded from pursuing the declaratory judgment action due to a conclusory allegation that property damage, expected from the insured's standpoint, is potentially covered because the conduct is alleged to have been "negligent". The Court will look behind the "label" a litigant uses in pleadings to the actual conduct of the insured that is alleged. Since the insured in this

case was warned about the consequences of using inferior shoring, and told that property damage would result from the use of unbraced shoring, his failure to use the braced shoring resulted in damages that he expected. This scenario could develop in any alleged property damage situation where the insured hires experts to perform work and the insured rejects the advice of the expert contractor and tries to "save money" by not following the expert's advice.

In any situation involving a landlord, or a homeowner making significant repairs or renovations to the premises, the coverage adjuster must look to the allegations of the tendered complaint that sets forth what the insured knew pre-loss, and whether the damages alleged are in any way related to the insured's decision-making process as alleged pre-loss date. If your insured has tendered to you a lawsuit which in any way contain allegations of intentional, consciously reckless or knowing behavior on the part of your insured, then it is in your best interests to scrutinize these allegations, and seek an opinion from us regarding the potential for coverage under any homeowner's or business liability policy. If you are unsure about the Company's a purported duty to defend, we can provide you with a coverage opinion that could save you thousands of dollars in defense and indemnity costs that might otherwise be incurred.

To learn more, or if you have any questions about this appellate decision, please contact Paul Festenstein or Guy Conti of Condon & Cook , LLC.