



COZEN
O'CONNOR®

INSURANCE COVERAGE

Alert!

News Concerning Recent Insurance Coverage Issues

June 2, 2008

www.cozen.com

PRINCIPAL OFFICE:

PHILADELPHIA	NEW YORK MIDTOWN
(215) 665-2000	(212) 509-9400
(800) 523-2900	(800) 437-7040

ATLANTA	NEWARK
(404) 572-2000	(973) 286-1200
(800) 890-1393	(888) 200-9521

CHARLOTTE	SANTA FE
(704) 376-3400	(505) 820-3346
(800) 762-3575	(866) 231-0144

CHERRY HILL	SAN DIEGO
(856) 910-5000	(619) 234-1700
(800) 989-0499	(800) 782-3366

CHICAGO	SAN FRANCISCO
(312) 382-3100	(415) 617-6100
(877) 992-6036	(800) 818-0165

DALLAS	SEATTLE
(214) 462-3000	(206) 340-1000
(800) 448-1207	(800) 423-1950

DENVER	TORONTO
(720) 479-3900	(416) 361-3200
(877) 467-0305	(888) 727-9948

HOUSTON	TRENTON
(832) 214-3900	(609) 989-8620
(800) 448-8502	

LONDON	WASHINGTON, D.C.
011 44 20 7864 2000	(202) 912-4800
	(800) 540-1355

LOS ANGELES	W. CONSHOHOCKEN
(213) 892-7900	(610) 941-5000
(800) 563-1027	(800) 379-0695

MIAMI	WILMINGTON
(305) 704-5940	(302) 295-2000
(800) 215-2137	(888) 207-2440

NEW YORK DOWNTOWN
(212) 509-9400
(800) 437-7040

500 Attorneys • 23 Offices

U.S. DISTRICT COURT: NEVADA RECOGNIZES RIGHT OF INSURER TO SEEK REIMBURSEMENT FOR SETTling UNCOVERED CLAIMS

*By: Joseph F. Bermudez, Esq., Chris S. Clemenson, Esq.,
Jason D. Melichar, Esq., Suzanne M. Meintzer, Esq.
jbermudez@cozen.com; cclemenson@cozen.com;
jmelichar@cozen.com; smeintzer@cozen.com.*

COZEN O'CONNOR

707 17th Street • Suite 3100 • Denver, CO 80202

Phone: 720.479.3926 • Fax: 720.479.3890

On April 24, 2008, the United States District Court for the District of Nevada recognized the right of an insurance company who settled all claims against its insured to seek reimbursement of those sums attributable to uncovered claims. *See Great American Ins. Co. of New York v. Vegas Const. Co., Inc.*, (D. Nev., Case No. 2:06-cv-00911-BES-PAL, 2008 U.S. Dist. LEXIS 37495).

Great American Insurance Company of New York and Great American Insurance Company (collectively, "Great American") insured Vegas Construction Company, Inc., Distinctive Homes, LLC, and Distinctive Homes Development Corporation (collectively, "Distinctive Homes.") When Distinctive Homes was sued in a construction defect lawsuit, Great American, along with other insurers, defended Distinctive Homes and ultimately settled the lawsuit for \$1.2 million. Great American's share of the settlement was \$540,000.

Following the settlement, Great American sought a judicial declaration that Distinctive Homes was required to reimburse Great American for amounts paid to settle uncovered claims. Great American contended that at least 25% of its \$540,000 settlement contribution was for claims that were either: (1) not for "property damage"; or (2) excluded by its policies' "your work" exclusion because the allegedly defective work was performed by Distinctive Homes.

Distinctive Homes countered that Great American was not entitled to reimbursement because Distinctive Homes did not perform the work while insured by Great American. Distinctive Homes also argued that Great American lacked evidence to establish how much was paid for uncovered claims verses covered claims. In addition, Distinctive Homes counter-claimed that Great American's attempt to seek reimbursement constituted bad faith and violated Nevada's unfair claim practices act.

The United States District Court for the District of Nevada rejected Distinctive Homes' argument that Distinctive Homes was required to have performed its work during Great American's policy periods in order for the "your work" exclusion to apply. The Court found that the "your work" exclusion unambiguously excluded "property damage" to Distinctive Homes' work, unless that work was performed by a subcontractor. The Court also noted that Distinctive Homes lacked any authority for the proposition that the exclusion only applied to work performed during the policy period.

As to Distinctive Homes' second argument – namely, that Great American lacked evidence to establish the amount paid toward uncovered claims – Great American argued that it was Distinctive Homes' burden to establish what was covered, not Great American's burden to establish what was not covered. Noting a lack of Nevada law on this issue, the Court relied on a Fourth Circuit case, *Perdue Farms, Inc. v. Travelers Cas. and Surety Co. of America*, 448 F.3d 252 (4th Cir. 2006), which held that in situations involving an allocation between covered and uncovered claims, the burden is on the insured to prove the amounts attributable to covered claims, and found that Great American had presented sufficient evidence to create a genuine issue of material fact for trial.

Finally, the Court dismissed Distinctive Homes' counter-claims for bad faith and violation of Nevada's unfair claims practice act. The Court held that there is no bad faith where an insurer sues its insured after properly paying all benefits due under the policy. In such situations, the Court found the insured has received all benefits bargained for under the policy. Consequently, where the insurer has followed proper procedures by settling the claim and filing a declaratory relief action to settle the coverage issues, the policies underlying bad faith must yield to the policy of encouraging free access to the courts. The Court held there was no actionable unfair claims practice claim because Distinctive Homes had not suffered any damages, effectively rejecting Distinctive Homes' argument that it had suffered damages in the form of attorneys fees. The Court stated that attorneys fees are not a recoverable damage absent an authorizing statute, rule, or contract, and the unfair claims practices act did not authorize the award of attorneys fees.

In light of the *Vegas Construction* decision, in appropriate circumstances, insurers in Nevada should consider the possibility of post-settlement proceedings to recover amounts paid to settle uncovered claims.

For a balanced analysis of Colorado's Insurance Accountability Act, as well as its impact on insurers, please contact Joe Bermudez, Chris Clemenson, Jason Melichar or Suzanne Meintzer of Cozen O'Connor's Denver, Colorado office. Cozen O'Connor is a nationally recognized leader in representing the insurance industry in all coverage areas.

© 2008 Cozen O'Connor. All Rights Reserved. Comments in the Cozen O'Connor Alert are not intended to provide legal advice. The analysis, conclusions, and/or views expressed herein do not necessarily represent the position of the law firm of Cozen O'Connor or any of its employees, or the opinion of any current or former client of Cozen O'Connor. Readers should not act or rely on information in the Alert without seeking specific legal advice from Cozen O'Connor on matters which concern them.