

## NEWS & INSIGHTS

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# Complicated insurance litigation arising from construction projects

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Despite best efforts, accidents and casualty losses can occur during construction projects. When property damage or physical injury occurs on a project, most construction companies know to submit a claim to their insurance carrier. Depending on the specific facts, the incident or claim may or may not be covered. Sometimes the incident leads to multiple lawsuits: (a) an injured party suing everyone; (b) an insurance company filing a “Dec Action”; and (c) all the parties suing each other for indemnity or risk shifting. These disputes are complicated. This article simplifies and explains it. For many readers, you may have gone through this experience already. And for those of you who have yet to do so... save this article... because these issues tend to arise every so often as a cost of

business.

## *Part I. The Incident/Claim that kickstarts everything*

The triggering event is the accident or casualty loss on the project site. This creates a variety of claims and insurance coverage issues. Whoever suffered the property damage or physical injury may have legal rights to sue a variety of players on the project. Often, the victim will file lawsuits against several key players, such as the owner, contractor, specific trade contractors of interest, and occasionally, design professionals or construction managers.

Most contractors know to submit these claims/lawsuits to their insurance carrier for defense and coverage. Perhaps the issue is covered by a CGL policy, Builder's Risk policy, or a workers' compensation policy if the injured party is an employee. This initial issue—coverage of the policy—can be a complicated matter that can result in litigation itself.

## *Part II. The Insurer's Reservation of Rights and "Dec Action"*

The insurer will evaluate whether the loss/claim is covered by the policy. For sake of simplicity, let's assume that the insurer responds with coverage and a Reservation of Rights Letter ("ROR"). A ROR Letter is the insurer asserting that (a) they are covering the defense of the claim; however, (b) if it turns out that the event is not covered by the policy, the insurer is reserving the right to withdraw its defense and coverage of the claim.

Sometimes, in the middle of defending a lawsuit, an insurer exercises its ROR option and seeks to withdraw its defense or coverage. The insurer will often file a Declaratory Action (lawsuit) against its own insured, seeking a court ruling that the withdraw is permissible. This is referred to as a "Dec Action" and frequently confuses and enrages the insured. The insured is already being sued by the plaintiff in the underlying incident. To be sued twice—now by its own insurer—is often a difficult pill to swallow. Recognize that there may be valid reasons for the insurer to withdraw coverage. Other times, however, it might constitute bad faith, and insureds will fight the Dec Action and seek to retain insurance coverage.

Thus, the insured construction company is now mired in multiple complicated litigation matters. The construction company will have an insurance appointed counsel defending the underlying claims arising from the injury; and the construction company will need to obtain its own separate private counsel to fight the insurance company's separate lawsuit regarding insurance coverage (Dec Action).

## *Part III. Further complications in the litigation*

Unfortunately, the situation often becomes more complicated. The various parties and co-defendants often sue each other, attempting to shift the loss. They might claim that another party was actually the one at fault. Or they might argue that they are entitled to additional insured coverage, contractual indemnity, contribution, subrogation or a variety of other risk/loss shifting doctrines that might require another party to cover the defense/claim.

By the end of this litigation stew, it is not uncommon for a construction company to have numerous docketed lawsuits, suing and defending multiple parties, and each party having multiple attorneys (defense counsel, coverage counsel and private counsel).

When a casualty loss arises on a project, best advice is to immediately reach out to your counsel and insurance brokers/agents for advice on your rights and submitting the claim. By consulting with your attorney and insurance advisors early, you will be in the best position to navigate the potential for multiparty litigation on multiple fronts, whether that be defense of the injury, seeking insurance coverage, or pursuit of claims.

Saxton & Stump attorneys [Ron Pollock](#), [Matt Chabal](#), and the chair of our Insurance Law practice group, attorney [Mike Traxler](#), are available to advise companies on contract issues, insurance disputes and construction litigation.

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