

ACE Wins On Rain Exclusion

The Johnson Firm LLC Wins Federal District Court Decision On The Rain Exclusion For Interior Water Damage During New Construction

United States District Court, District of Nevada

Judge Sandoval, Order Issued May 8, 2008: ACE Property and Casualty Insurance Company vs. Vegas VP LP, Case No. 2:07-CV-00421-BES-PAL

Owner of Las Vegas high-rise “Metropolis Condominium,” Vegas VP LP, presented claim to ACE Property and Casualty Insurance Company for soft-cost damages claimed to have resulted from rain water damage to interior building finishes where rainwater entered building under construction during December 29-30, 2004 rainstorms. ACE P&C, believing the rain exclusion should bar coverage, approved the bringing of a declaratory judgment action in the Federal District Court in Las Vegas. A strategic decision was then made to try and negotiate with insured’s counsel to first put critical questions regarding the applicability of the rain exclusion to the Judge before incurring substantial cost in discovery related to the soft-costs claim. While a great number of facts were disputed, the insured, at best, could only argue that temporary water protection measures (visqueen tarping) was in some fashion damaged allowing the rain water to enter. ACE P&C disputed the location of any such damage to visqueen and what if any water entered the structure through such claimed visqueen damage as contrasted to the unfinished roofs, windows and walls having numerous openings, cracks and gaps with no cover whatsoever. Clearly, as to source, location and volume of water entering via different pathways, the parties were in sharp dispute. However, the insured acknowledged that it had no evidence that any damage occurred from the rainstorm to any part of the designed or permanent building elements (roof, windows or walls), which damage first created an opening through which any rain entered.

Thus, the plan, under those facts, was to put the critical legal issue to the Court on the applicability of the rain exclusion, and if the insured still had a claim after the Court’s review, then undertake discovery on where water came in that was not barred by the rain exclusion, what damage occurred by that water which was covered vs. water that was clearly excluded, and what insured soft cost damages could be proven resulting from said insured rain water damage to covered property (the insured was also attempting to claim various damages as “soft cost” that were not within that coverage under the policy). The discovery that was set aside would have involved substantial expense involving many of the contractors on the construction project and multiple experts.

It was a difficult process obtaining agreement with the insured to forego discovery and instead test the rain exclusion and the Federal Magistrate Judge was reluctant to approve this procedure. Yet, ultimately we were successful in getting this strategy approved by the insured and the Court. There-

after minimal discovery occurred, and, a few months ago, ACE P&C's summary judgment motion was filed and the insured filed a counter summary judgment motion.

After oral argument, by Mike Johnson in April, on May 8, 2008, JUDGE SANDOVAL GRANTS ACE P&C JUDGMENT RULING COVERAGE IS BARRED BY THE RAIN EXCLUSION.

The Court ruled that:

Exclusion S is broad and unambiguous. It excludes coverage for all damage caused by rain entering the Building unless the "roof, windows, or walls" "first sustain []" windstorm or hail damage through which rain enters. . . . Though the terms are not defined in the policy, they are not ambiguous. The plain and ordinary meaning of "roof" describes a permanent structure that covers a building. Likewise, the plain and ordinary meaning of "window" and "wall" connotes a permanent partition or window fitting designed to bear the load of a roof and the force of the elements.

...

Visqueen tarps, however, do not constitute "roof, windows, or walls" within the meaning of the Policy.

...

. . . Here, again, this reading of the Policy is consistent with the decision a builder undertakes as to whether to begin work on the interior before completing the permanent exterior.

In short, the Court's decision is strongly in favor of upholding the integrity of the exclusion. If the contractor wishes to take the business risk, to accelerate the schedule, by beginning the interior finishes prior to constructing a weather tight exterior with the designed buildings elements, that is a decision the contractor can make at its peril, it is not a risk the insurer must accept and the rain exclusion protects the insurer from that unwanted risk.

We are happy to provide the entire Order to those within ACE that would like to receive it.

Best regards,
THE JOHNSON FIRM, LLC