PLUNKETT COONEY

# Causation, Duty to Defend Coverage Update

December 15, 2016
**Florida, Massachusetts, Oregon Coverage Cases**

## Causation – Florida

***Sebo v. Am. Home Assurance Co.***
--- So.3d ---, 2016 WL 7013859 (Fla. Dec. 1, 2016)

The Florida Supreme Court concluded that the Concurrent Cause Doctrine (CCD) was the applicable theory of recovery to employ when two or more perils caused a loss under an all-risk homeowner's policy. Under the CCD, "coverage may exist where an insured risk constitutes a concurrent cause of the loss even when it is not the prime or efficient cause." In this case, the Supreme Court found it was undisputed that rainwater and hurricane winds combined with defective construction, causing the damage to the house. Consequently, there was no way to distinguish the proximate cause of the loss because "the rain and construction defects acted in concert to create the destruction of [the] home." The Supreme Court reasoned that coverage was available under the CCD even though "no efficient cause [could] be determined." In other words, "[w]here weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage." Accordingly, because the homeowner's policy "did not explicitly avoid applying the CCD," the Supreme Court found that "the plain language of the policy does not preclude recovery in this case."

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## Duty to Defend – First Circuit (Massachusetts Law)

***Sanders v. Phoenix Ins. Co.***
--- F.3d ---, 2016 WL 7131484 (1st Cir. Dec. 7, 2016)

The U.S. Court of Appeals for the First Circuit ruled that a homeowners policy did not provide coverage for a demand against the insured attorney who had an affair with a client who, subsequently, committed suicide. After the client's death, the executor of the decedent's estate sent a demand letter to the attorney, alleging a violation of Massachusetts' Unfair Business Practices Act. Eventually, the insured consented that his liability amounted to $500,000 and assigned his claim against his insurer to the executor. The executor argued that the insurer breached its obligations, because the demand letter was sufficient to trigger a duty to defend, comparing the demand letter to a notice letter from the Environmental Protection Agency to a potentially responsible party (PRP letter) which, under Massachusetts law, is sufficient to trigger a duty to defend. The appellate court disagreed,

distinguishing a PRP letter from a "conventional demand letter based on a personal injury claim" by recognizing that the failure to respond to a PRP letter would all but forfeit the insured's case, whereas ignoring a demand letter would not "substantially compromise[ ] an insured's position" because it would not affect the insured's underlying liability. Accordingly, the notice letter did not trigger the insurer's duty to defend.

## Duty to Defend – Oregon

***West Hills Dev. Co. v. Chartis Claims, Inc.***
--- P.3d ---, 360 Or. 650 (Ore. Dec. 8, 2016)

The Oregon Supreme Court held that an insurer owes a duty to defend its insured even where the underlying complaint is unclear as to whether it alleges a covered claim. The underlying complaint was filed against a general contractor for alleged water damage caused by negligent construction. The complaint further alleged that the water damage existed when the properties were purchased, was caused by negligent work performed by unidentified subcontractors, and that the general contractor was negligent. The policy in question was issued to one of the subcontractors, and included the general contractor as an insured only with respect to liability arising out of the subcontractor's ongoing operations. Applying a strict four corners duty to defend analysis, the Supreme Court held that "the insurer ha[d] a duty to defend, even if the complaint is unclear about whether it alleges a covered injury." While the underlying complaint did not specifically allege that the damages arose out of the subcontractor's ongoing operations, the Supreme Court held that it was at least possible that the damages could have existed while the subcontractor was still performing work. Accordingly, the insurer owed a defense to the general contractor.

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