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Versa Fittings ruling underscores high bar to relieve insurer of duty to defend

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It also demonstrates the expansive approach a court will adopt to the definition of property damage in the context of product liability cases. Only if coverage is necessarily excluded on a generous reading of the pleadings, will an insurer be relieved of any duty to defend.

These insurance coverage motions arose from various product liability claims brought against Versa Fittings, alleging that it had manufactured faulty valves. A defect in the valves was alleged to have caused flooding and property damage in the plaintiffs' condominiums. Versa Fittings brought a motion against its insurers Continental Insurance and Berkley Insurance, seeking a declaration that one or both were obliged to defend the product liability claims on its behalf. Continental Insurance also brought a motion seeking a declaration that it owed no duty to defend as property damage occurred after its policy provided coverage.

Berkeley Insurance argued that the matter was not suited to a motion under Rule 21— which decides a question of law based on pleadings – because there were material facts in dispute which required a full record. Justice Mew adopted a pragmatic approach and held that Rule 21 remained an appropriate mechanism for parties to seek a timely and relatively inexpensive determination of an insurer's duty to defend its insured. The existence of a duty to defend was a point of law. The court's ruling would be without prejudice to any subsequent determination of Berkeley's defences.

As to whether Continental's duty to defend was triggered, the pleadings all referenced the flooding as the point in time of damage, which suggested property damage *outside* of

Continental's policy period. But the court affirmed that the precise form and language of the pleaded claim are not determinative. It will suffice if there is at least a mere possibility that the allegations would give rise to covered claims; and the Court can draw reasonable inferences from the pleadings as to the substance of the claims. Here, the valves were installed during the Continental policy period. The substance of the claim was a product defect. With the introduction of a defective product, there can be ongoing deterioration causing property damage and the precise timing of property damage may not be clear. There was also an allegation of negligent installation and supply of a defective valve. The Court held that these were sufficient triggers for a duty to defend – it was possible for the trial judge to determine that property damage occurred at an earlier point in time, before the ultimate failure and floods. In the result, both Continental and Berkeley owed the Insured a duty to defend the claims.

The expansive approach of this decision to product liability cases demonstrates once again the uncertain reach of occurrence-based insurance policies, where multiple policies may be triggered in the face of potential ongoing deterioration causing property damage. The time between installation of a faulty product and ultimate failure, of course, may be very long. As multiple insurance policies and duties to defend are triggered, this opens the way to further potential litigation concerning allocation and contribution among insurers.

- Research contributed by George White, 2014/2015 Fox Scholar.