

## 4th Circ. Calls For Treble Damages In Collapse Coverage Row

By **Hope Patti**

Law360 (April 18, 2022, 6:29 PM EDT) -- The Fourth Circuit reversed a lower court's decision limiting an apartment complex owner's damages for a walkway collapse, saying Monday that the owner's contract damages should be trebled because of a Tokio Marine insurer's violation of North Carolina's Unfair and Deceptive Trade Practices Act.

The appellate court affirmed a district judge's summary judgment decision in favor of DENC LLC in a published opinion, ruling that Philadelphia Indemnity Insurance Co. improperly denied coverage of the apartment owner's claim.

A panel majority — including U.S. Circuit Judges Albert Diaz, who authored the opinion, and Henry F. Floyd — also held that the insurer failed to explain its basis for denial in violation of the UDTPA. As such, the judges reversed the judgment with respect to the award for damages and instructed the court on remand to treble DENC's contract damages.

While U.S. Circuit Judge Allison Jones Rushing concurred that the insurer's policy covered the collapse, she disagreed that Philadelphia Indemnity failed to reasonably explain its denial of coverage in violation of the UDTPA. In her dissenting opinion, Judge Rushing concluded that there is no basis for attorney fees or treble damages.

The coverage dispute between Philadelphia Indemnity and DENC began in January 2018 when a second-floor walkway at DENC's Crest at Elon complex, which is located near Elon University's campus, partially collapsed during a college party.

The incident occurred when partygoers began jumping on the walkway, causing it to suddenly shift and drop at least one foot. No one was injured, but local authorities condemned the building shortly after.

DENC filed a claim with Philadelphia Indemnity; however, the insurer said coverage was barred because the damage was caused by long-term water intrusion and decay due to defective construction.

The apartment owner sued the insurer in North Carolina state court in July 2018, asserting claims of breach of contract and bad faith, as well as UDTPA violations. Philadelphia Indemnity removed the case to federal court that September.

A federal judge ruled in 2019 that the policy's collapse endorsement covered the event, explaining that DENC was only required to show that the weight of the partygoers contributed to the collapse. The judge also ruled that Philadelphia Indemnity did not act in bad faith when denying the claim, but found that the insurer violated one section of the UDTPA. The apartment owner was awarded more than \$620,000 for contract damages and attorney fees.

Philadelphia Indemnity is liable for breach of contract, the panel held, adding that the insurer failed to meet its burden to show that an exclusion barred coverage of DENC's loss.

The panel rejected Philadelphia Indemnity's contention that the loss began before the policy period, saying the insurer mistakenly framed DENC's loss as water damage caused by defective construction that took place more than a decade earlier, rather than the walkway collapse. If the insurer's position

was correct, Judge Diaz said that would render the policy terms meaningless and the court would not "characterize the loss in a way that precludes an entire category of coverage."

Moreover, Judge Diaz said the insurer incorrectly asserted that the policy did not cover the temporary housing expenses that DENC incurred for relocating students while the walkway was being repaired. The judge found that the expense was both linked to the collapse and "positively needed" in order for DENC to avoid suspension of its business.

The court correctly held that Philadelphia Indemnity violated the UDTPA by first granting coverage and then denying it without a reasonable explanation as to why, the majority said, adding that the insurer "made no attempt to bridge the gap between policy and fact."

However, the court erred when it refused to treble DENC's contract damages, according to Judge Diaz. Philadelphia Indemnity's UDTPA violation proximately caused DENC's damages, the judge said, explaining that treble damages are warranted when a UDTPA claim arises from a breach of contract and aggravating factors.

The majority also affirmed the lower court's award for attorney fees to the apartment owner, saying that Philadelphia Indemnity's UDTPA violation was willful and that the insurer engaged in an unwarranted refusal to settle with DENC.

Counsel for the insurer did not immediately respond to a request for comment Monday. Counsel for DENC could not be reached.

U.S. Circuit Judges Albert Diaz, Henry F. Floyd and Allison Jones Rushing sat on the panel.

DENC is represented by John E. Branch III and Andrew D. Brown of Shanahan Law Group PLLC and Gregg E. McDougal and Lawrence R. Duke of The McDougal Law Firm PLLC.

Philadelphia Indemnity is represented by David L. Brown and David G. Harris II of Goldberg Segalla LLP.

The case is DENC LLC v. Philadelphia Indemnity Ins., case number 20-1640, in the U.S. Court of Appeals for the Fourth Circuit.

--Editing by Nick Petruncio.