

**ALERT**

# Policy Language Prohibits Insurer from Recouping Defense Costs Advanced for Non-Covered Claim

May 22, 2014

Applying New Jersey law, a New York appellate court held that policy language prohibited an insurer from recouping defense costs advanced for a non-covered claim. *Nat'l Union Fire Ins. Co. v. Turner Const. Co.*, 2014 WL 1923586, No. 11927 (N.Y. App. Div. May 15, 2014).

An insured contractor and subcontractor tendered a lawsuit filed by a building owner to their commercial general liability insurer. The lawsuit alleged that the insureds committed breach of contract, breach of warranty, and negligence during the design and installation of a building curtain wall. The insureds tendered the lawsuit to their insurer, and the insurer agreed to provide a defense under a reservation of rights and filed a declaratory judgment seeking a determination that it had no duty to defend or indemnify the insureds for the lawsuit. The insurer also sought to recoup defense costs it advanced during the pendency of the coverage action.

After holding that the lawsuit was not covered under the commercial general liability policy because faulty design and installation do not constitute an "occurrence," the court held that the insurer could not recoup defense costs it advanced to the insureds in the underlying lawsuit. The court stated that an insurer was normally entitled to reimbursement of defense costs for a non-covered claim because the insured otherwise would be unjustly enriched but that such reimbursement would not be allowed if it contravened the policy's terms. The policy included an endorsement that provided that the insurer "agrees not to take action or recourse against any insured for loss paid or expenses incurred because of any claims made against

## Practice Areas

D&O and Financial Institution Liability  
E&O for Lawyers, Accountants and Other Professionals  
Insurance  
Professional Liability Defense

this policy.” The court held that this provision barred the insurer from recovering advanced defense costs. In doing so, the court rejected the insurer’s argument that the provision applied only to covered claims because the endorsement did not differentiate between covered and uncovered claims.

The opinion is available [here](#).