Insurer's Silence Does Not Evidence Consent For Purposes of Voluntary Payments Condition

Article By:

Andrew May

In West Bend Mutual Insurance Co. v. Arbor Homes LLC, No. 12-2274 (7th Cir. Jan 8, 2013), the Seventh Circuit reaffirmed the critical importance of obtaining an insurer's consent before settling a case.

The coverage action arose out of what Judge Rovner humorously characterized as "the biggest mistake a plumber can make: he forgot to connect the home's drainage system to the city's sewer." As a consequence of that fatal error, the aggrieved homeowners demanded that the homebuilder furnish them with a new home. Since the homebuilder was an additional insured on the plumber's policy, the homebuilder requested that the plumber place its insurer on notice of the homeowners' potential claims. Meanwhile, the homebuilder negotiated a settlement, which it believed the plumber communicated to its insurer. Hearing nothing from the insurer in response, the homebuilder mistook the insurer's silence for acquiescence to the terms of the settlement. In reality, the insurer never consented to the settlement and subsequently denied coverage under the voluntary payments condition in the policy.

The Seventh Circuit affirmed the district court's denial of coverage based on the homebuilder's failure to obtain the insurer's consent before settling. While the court credited the homebuilder for behaving "very admirably in addressing the problem for the new homeowners," it ultimately concluded that the homebuilder "failed to protect its own interests." The court emphasized that the voluntary payments provision was "not a notice provision, per se, but a consent provision," and because the insurer did not assent to the terms of the settlement, the insurer was entitled to deny coverage.