Case Alert

A Busy Week for Defective Construction as an "Occurrence" – New Jersey and Oklahoma Courts Weigh In

On July 9, 2015, a New Jersey state appellate court and an Oklahoma federal district court each issued a ruling concerning insurance coverage for defective construction and found that the claims constituted "property damage" caused by an "occurrence" under the respective CGL policies.

Previously, New Jersey case law exhibited a staunch, no "occurrence" approach to insurance claims related to defective or faulty workmanship. The *Weedo v. Stone-E Brick, Inc.*[1] case is one of the earliest, and most notorious, cases addressing insurance coverage for defective construction in the country. In *Weedo*, the New Jersey Supreme Court held that a contractor has control over the quality of its work and, thus, must bear the cost of curing its own deficient performance. Despite the fact that the *Weedo* court did not analyze the modern ISO policy form or the definition of "occurrence," courts (both within New Jersey and throughout the country) and insurers have continued to rely on it as a basis for denying coverage for defective construction claims.

In 2006, the New Jersey appellate division, in the case of *Firemen's Insurance Co. of Newark v. National Union Fire Insurance Co.*[2], noted that there could potentially be an "occurrence" when faulty work damages some other non-defective work; however, the court found in that case that there was no "occurrence" because the only damage involved related to the cost to repair the defective work itself. Two years later, the District Court joined the discussion in the case of P*ennsylvania National Mutual Casualty Co. v. Parkshore Development Corp*.[3], where it decided that a general contractor's work was the entire project and, thus, there was no damage to anything other than the general contractor's work and, therefore, no "occurrence."

With this troubled case law as a backdrop, the appellate division nevertheless found in the case of *Cypress Point Condominium Association, Inc. v. Adria Towers LLC* [4], that consequential damage to condominium unit owner's property and common areas caused by the deficient work of subcontractors constituted "property damage" caused by an "occurrence." The trial court previously found that the condominium association's suit against the project's general contractor, which sought coverage for damage to common areas and unit owners' property caused by deficient installation of the roof, flashing, building façade and other components of the project, did not trigger coverage under the general contractor's CGL policy.

On appeal, the court reversed and concluded that there was "property damage," because the consequential damages alleged by the association clearly constituted "physical injury to tangible property" in accordance with the definition. As to the existence of an "occurrence," the court explained that the "accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury." Since no one could credibly contend that the subcontractors intended their faulty workmanship to cause property damage, the damages were deemed an "occurrence." After finding the insuring agreement was satisfied, the appellate court remanded the case for a determination of whether any exclusions barred coverage.

A critical aspect of the court's decision in *Cypress Point* is its distinguishing of *Weedo*, *Firemen's*, and *Parkshore Development*. The *Cypress Point* court recognized that *Weedo* did not address whether consequential damages resulting from a subcontractors' faulty workmanship constituted "property damage" caused by an "occurrence." Furthermore, the court ac-

curately noted that those decisions interpreted an older policy form (1973 versus 1986), which contained a different definition of "occurrence" and, moreover, did not contain a subcontractor exception to the "your work" exclusion (exclusion l). These changes in the form, the court explained, bolstered its finding of "property damage" caused by an "occurrence." Overall, the thorough and well-reasoned decision of the *Cypress Point* court signals a change in the tide in New Jersey, from blind adherence to outdated case law to a more modern and thoughtful consideration of these issues.

Also on July 9, the U.S. District Court for the Western District of Oklahoma issued a ruling in *Essex Insurance Co. v. Sheppard & Sons Construction* and held that there was an "occurrence" where faulty workmanship was alleged. In general, Oklahoma case law is underdeveloped in this area, with only one prior district court case squarely addressing the issue[5]. The insurer in *Sheppard & Sons* brought suit against its insured, a general contractor, seeking a declaration that it owed no duty to defend claims alleged by a dental practice for property damage resulting from poor site preparation of the practice's facility.

The court noted that "under well-settled Oklahoma law, the term 'accident' when used in an insurance contract, has no technical legal meaning, but instead should be construed according to common speech and common usage of people generally." The insurer argued that if the insured performed a voluntary act (i.e., construction work), the natural results of that act, including defective construction, cannot constitute an "occurrence" under a CGL policy. The court rejected that argument, holding that the voluntariness of the conduct is not the determining factor; rather, the court considered whether the resulting damage was expected by the insured. It was undisputed that neither the general contractor nor the subcontractor intentionally provided defective work and, as such, the court held that there was an "occurrence" and the insurer was obligated to defend.

Both the *Cypress Point* and *Sheppard & Sons* decisions provide a well-reasoned analytical framework for determining whether claims of deficient work constitute an "occurrence" under CGL policies. These decisions should have a positive impact for policyholders seeking coverage for defective construction claims in New Jersey and Oklahoma.

For a complete overview of how each state analyzes the "occurrence" issue in defective construction claims, please see SDV's 50 State Survey[6].

For further information on the impact of the *Cypress Point* and *Sheppard & Sons* decisions, please contact Jeffrey J. Vita at jjv@sdvlaw.com or 203.287.2103, or Theresa A. Guertin at tag@sdvlaw.com or 203.287.2119.

1. 405 A.2d 788 (N.J. 1979).
2. 904 A.2d 754 (N.J. Super. Ct. App. Div. 2006).
3. 2008 U.S. Dist. LEXIS 71318 (D.N.J. Sept. 10, 2008).
4. 2015 N.J. Super. LEXIS 114 (N.J. Super. Ct. App. Div. July 9, 2015).
5. See Employers Mut. Cas. Co. v. Grayson, 2008 U.S. Dist. LEXIS 43255 (W.D. Okla. May 30, 2008)
6. http://www.sdvlaw.com/wp-content/uploads/2015/02/Defective-Construction-as-an-Occurrence-current-10.03.2014.pdf