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New Wave of “Occurrence” Statutes Doesn’t Affect Old Policies

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Last year, we reported on four state statutes supporting the position that allegedly defective construction constitutes a covered “occurrence” under a commercial general liability (“CGL”) insurance policy. This article provides an update now that the courts have addressed three of the statutes. In general, the decisions hold that the new statutes apply only to policies issued on or after the effective dates of the statutes, not to existing or expired policies. The decisions also tend to find coverage not for the faulty construction itself but only for consequential damage to other property. Therefore, it remains unclear whether or to what extent these statutes have corrected errors in prior case law or resolved the uncertainty that continues to surround insurance coverage for construction defect claims.

Colorado

Section 13-20-808 of the Colorado Code, effective May 21, 2010, creates a presumption that a construction defect is an accident and therefore an “occurrence” within the meaning of the standard CGL insurance policy. In *Greystone Construction, Inc. v. Nat’l Fire & Marine Ins. Co.*, 661 F.3d 1272, 1282 (10th Cir. 2011), the United

States Court of Appeals for the Tenth Circuit held that the statute does not apply retroactively. Because the statute did not apply to the existing policy at issue in Greystone, the court decided the case under Colorado common law. In particular, the court held that an "occurrence" includes "unforeseeable damage to nondefective property arising from faulty workmanship." *Id*. More recently, in *TCD, Inc. v. Am. Family Mut. Ins. Co.*, 2012 WL1231964 (Colo. App. 2012), a Colorado state court of intermediate appeals reached the same conclusions. Thus, Colorado common law continues to find coverage for resulting damage to other property as an "occurrence," but it is unclear whether the law will change when the new statute is held to apply.

Hawaii

Chapter 431, Article 1 of the Hawaii Revised Statutes provides that "the term 'occurrence' shall be construed in accordance with the law as it existed at the time that the insurance policy was issued." The statute was an express reaction to the appellate court decision in *Group Builders, Inc. v. Admiral Ins. Co.*, 231 P.3d 67 (Hawaii 2010), which denied coverage for both defects in the nsured's own work and also consequential property damage caused by faulty workmanship. In two recent cases, the United States District Court for the District of Hawaii held that the statute has no effect on policies that were issued before the statute was enacted. *See Illinois Nat'l Ins. Co. v. Nordic PCL Construction, Inc.*, 20s12 WL 1492399 (D. Haw. 2012); *State Farm Fire & Cas. Co. v. Vogelgesang*, 834 F.Supp.2d 1026, 1036–37 (D. Haw. 2011). Unfortunately, the statute does not state what the law should or would be after its May 19, 2010 enactment. Thus, in a coverage dispute under a policy issued after the May 19, 2010 enactment date, a court could still hold that Group Builders remains the applicable law because no further Hawaii decisions have been issued to change the law. While such a holding could be seen as finding the statute meaningless, this may be the regrettable result of the Hawaii legislature's failure to state whether it intended the statute to change the existing law regarding coverage for faulty construction.

Arkansas

Arkansas Code Section 23-79-155 requires CGL policies offered for sale in Arkansas to contain a definition of occurrence that includes "property damage or bodily injury resulting from faulty workmanship." No reported decisions have addressed this statute, which was enacted on March 23, 2011. It therefore remains unclear whether this requirement applies to policies previously issued. The act also states that it does not limit the nature or types of exclusions that an insurer may include in a CGL policy. Thus, the Arkansas statute does not affect the numerous exclusions related to construction defect claims contained in the typical CGL insurance policy, and the judicial decisions that have interpreted those exclusions presumably remain good law.

South Carolina

South Carolina Code Section 38-61-70 provides that CGL policies shall contain or be deemed to contain a definition of "occurrence" that includes property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship

itself. The statute was challenged in the South Carolina Supreme Court, just six days after its May 17, 2011 enactment. Just a few weeks ago, the Court held that the statute violated the South Carolina Constitution's contract clause when applied to policies that already existed. *Harleysville Mut. Ins. Co. v. State of So. Carolina*, Opinion No. 27189 (S. Car. 2012). The Court severed the unconstitutional portion and allowed the statute to apply to insurance policies issued on or after May 17, 2011. Thus, all newer policies in South Carolina are deemed to define "occurrence" to include damage or injury that results from defective construction, but not the faulty workmanship itself.

Conclusion

The four state statutes discussed above were enacted to make it clear that construction defect claims give rise to an "occurrence" under the CGL insurance policy and therefore at least potentially trigger coverage unless coverage is defeated by a policy exclusion or other provision. How much the statutes actually help construction policyholders remains uncertain. While the Arkansas statute has yet to be tested in the courts, the Colorado, Hawaii and South Carolina statutes have been held, in one fashion or another, not to apply retroactively to policies issued before the statutes were passed. As for new policies, the statutes generally support coverage for damage to non-defective property, but there may be no coverage for repair or replacement of the insured's defective work itself. Moreover, the statutes generally do not address or alter any existing or future exclusions that insurers may use to deny coverage for construction defect claims. But to construction policyholders, the limited help that these statutes appear to provide is certainly better than no help at all.