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MARCH 17, 2009

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COLORADO COURT OF APPEALS: FAULTY WORKMANSHIP IS NOT AN OCCURRENCE

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On February 19, 2009, the Colorado Court of Appeals held that a claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes an occurrence, regardless of the underlying legal theory pled. *General Security Indemnity Company of AZ v. Mountain States Mutual Cas. Co.* (Case Nos. CA07CA2291 & 07CA2292, February 19, 2009).

General Security involved an action brought by General Security, the insurer of Foster Frames, a window and door subcontractor on a large condominium project, against the insurers of Foster Frames' sub-subcontractors (Foster Frames was allegedly an additional insured on those policies). General Security claimed it was entitled to contribution to the costs it incurred defending Foster Frames against a third-party action brought by the general contractor. The general contractor had been sued by the condominium project's homeowners association (HOA) for construction defects and, in turn, had filed "pass through" claims against Foster Frames.

The *General Security* Court focused its attention on whether there had been an "occurrence" triggering coverage. The sub-subcontractors' insurance policies defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Court, after reviewing prior Colorado decisions, held that the term "accident" meant a "fortuitous event" or "an unanticipated or unusual result flowing from a commonplace cause." The Court then examined decisions from within and without Colorado and joined the majority of jurisdictions that hold claims of poor workmanship, standing alone, are not occurrences because poor workmanship is not fortuitous or unexpected.

The Court expressly rejected arguments that it was required to focus on the *expectations or intentions* of the insured, as some prior Colorado case law had suggested was necessary, because unlike the policies in those prior cases, the policies before it did not use the pre-1986 CGL definition of "occurrence", which expressly included those terms. The Court found the different policy language to be significant. The Court further noted that to imply an expectation or intention requirement in the "occurrence" definition would render superfluous the policies' exclusions for damages expected or intended from the standpoint of the insured.

Although the Court held poor workmanship was not an "occurrence," the Court recognized that an "occurrence" might exist if consequential property damage resulted from that poor workmanship. It therefore turned to the allegations in the HOA's complaint and the general contractor's third-party complaint to determine if allegations of consequential damages existed. The HOA's complaint alleged:

31. On information and belief, those errors [enumerated in 30 of the complaint], deficiencies and defects, for which defendants are legally liable, have caused, and continue to cause, actual property damage, loss of use and/or other losses to the Association, and consequential damage to, and the loss of use of, various elements of the Project, over time, from the date those areas were first put to their intended use.

The general contractor's third-party complaint incorporated those same allegations, asserting: "To the extent that the allegations made in the HOA's Complaint are true, which [the general contractor] denies, any and all damages incurred by the HOA were proximately caused in whole or in part by the

breach of contract by the Third-Party Defendants [including Foster Frames] and/or their subcontractors.”

While recognizing the allegations for “other losses” and “consequential damage” made in the HOA’s complaint, the Court found no allegations of consequential damages resulting from Foster Frames’ allegedly defective workmanship. For example, although the HOA’s complaint alleged cracking of interior floors from structural foundation movement, such damage was not related to the work done by Foster Frames, the window and door subcontractor. Because the consequential damage allegations contained nothing substantive related to Foster Frames’ work, the Court found that no “occurrence” had been alleged.

In light of the *General Security* opinion, insurers of construction professionals involved in construction defect litigation should carefully examine the allegations made

against their insureds to determine if consequential damages implicating their insured’s work are being alleged. If no such allegations exist, insurers may be able to disclaim coverage based on the absence of an “occurrence”. Conversely, insurers defending insureds where consequential damages are alleged who may have an opportunity to pursue contribution or subrogation rights against subcontractors (or sub-subcontractors) need to be mindful of how those claims are pled in order to trigger available insurance coverage.

The views expressed in this paper do not necessarily represent the opinions of Cozen O’Connor, its employees or any former or current client of Cozen O’Connor. For further analysis of the General Security decision and its impact on liability insurers, please contact Joe Bermudez, Chris Clemenson, Jason Melichar or Suzanne Meintzer of Cozen O’Connor’s Denver, Colorado office. Cozen O’Connor is a nationally recognized leader in representing the insurance industry in all coverage areas.