

ALERT

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Colorado Statute Concerning Insurance For Construction Defects Does Not Apply Retroactively, But Property Damage Caused By Poor Workmanship Is An Occurrence

Christopher S. Clemenson • 720.479.3894 • cclemenson@cozen.com

Mark A. Bartholomaei • 20.479.3932 • mbartholomaei@cozen.com

On November 1, 2011, the 10th Circuit Court of Appeals held that a Colorado statute regarding insurance for construction defects does not apply retroactively, but that any property damage caused by poor workmanship may nevertheless qualify as an "occurrence" so long as the resulting damage is to nondefective property. *Greystone Const., Inc. v. National Fire & Marine Ins. Co.*, Case No. 09-1412 (10th Cir. Nov. 1, 2011).

Last year, the Colorado General Assembly enacted a statute governing insurance policies issued to construction professionals. C.R.S. § 13-20-808. Among the more controversial provisions of the new law are:

- the presumption that the work of a construction professional that results in property damage, including damage to the work itself, is an accident unless the property damage is intended and expected by the insured; and
- the declaration that claims-in-progress or pre-existing damage exclusions are void as against public policy.

In addition, the enacting language for the statute stated that it was to apply to "all insurance policies currently in existence or issued on or after the retroactive date," leading policyholders to argue that the statute applied retroactively.

The purported retroactive application of the statute was squarely addressed by the 10th Circuit. After analyzing the legislative history of the statute and comparable language in other statutes, the 10th Circuit held that the phrase "in existence" referred only to policies with policy periods that had not yet expired. Thus, according to the 10th Circuit, C.R.S. § 13-20-808 was not intended to apply retroactively. This holding obviated the need for the 10th Circuit to address the constitutionality of retroactive application.

Although the 10th Circuit found that the statutory interpretative guidelines for what constitutes an "occurrence" did not apply because the policies at issue expired before the statute was enacted, it nevertheless overruled the trial court's determination that damages resulting from faulty workmanship were not "accidental," and therefore not the result of an "occurrence." In doing so, the 10th Circuit held that injuries flowing from improper or faulty workmanship constitute an occurrence "so long as the resulting damage is to nondefective property, and is caused without expectation or foresight." According to the 10th Circuit, whether resulting damage is foreseeable depends on whether the damages would have been foreseeable if the builder had completed the work properly, an issue that can only be determined by the facts and circumstances of each particular case.

The case before the 10th Circuit involved damages to homes caused by expansive soils. The 10th Circuit applied its interpretive rules and found there was an "occurrence" with respect to damages to basement floors and upper living areas because those damages were to otherwise nondefective property caused "by faulty workmanship that failed to account for exposure to expansive soils." On the other hand, the 10th Circuit found no "occurrence" with respect to damages to the drainage system and structural elements because those damages were damage to the defective work itself. According to the 10th Circuit:

CGL policies implicitly distinguish between damage to nondefective work product and damage to defective work product. In this case, the homes' soil-drainage and structural elements were potentially defective. The potential defects in these aspects of construction may have caused damage to the homes themselves – the nondefective work

product [T]he logic of CGL policies requires us to conclude that the damage to the homes is covered, while the damage to the soil-drainage and structural elements is not. The obligation to repair defective work is neither unexpected nor unforeseen under the terms of the construction contract or the CGL policies. Therefore, repairing the foundations represents an economic loss that does not trigger a duty to defend under the CGL policies.

For purposes of whether there had been an "occurrence," the 10th Circuit also rejected any attempt to distinguish damages to an insured's own work versus damages to a third-party's property. The 10th Circuit found such matters more appropriately addressed in policy exclusions, such as the "Your Work" exclusion.

In short, under the rule announced in *Greystone Construction*, damage to a contractor's nondefective work, even if such damage arose out of poor workmanship, may fall under a CGL policy's grant of coverage. Damage to the defective work itself, however, is not covered.

The attorneys of Cozen O'Connor will continue to keep our valued clients apprised of developments in this area.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact Christopher S. Clemenson at 720.479.3894 or cclemenson@cozen.com or Mark A. Bartholomaei at 720.479.3932 or mbartholomaei@cozen.com.