Gregory A. Brockwell; Leitman, Siegal & Payne, P.C.

"OCCURRENCE" Now Means "ACCIDENT" In Alabama, Too: An Update

In the Spring 2014 Bulletin, p. 12, the article "'Occurrence' Means 'Accident'" surveyed the significant recent developments across the country on the issue of whether or not a construction defect (or damage resulting from a construction defect) can be an "occurrence" under the ordinary commercial general liability ("CGL") insurance policy. The article summarized cases from North Dakota, Connecticut, West Virginia, Georgia, and Alabama. At the time of the article's publication, however, the Alabama case of *Owners Insurance Co. v. Jim Carr Homebuilder, LLC*, was pending an application for rehearing and had not yet been finally decided.[1] Now that the Owners case is finally resolved, this article provides an update.

BACKGROUND

In the *Owners* case, a homeowner contracted with a homebuilder for the construction of a new house. Within a year after completion of the house, the homeowner noted several problems with the house related to water leaking through the roof, walls, and floors—resulting in water damage to those and other areas of the house. The homeowner sued the homebuilder and obtained a judgment of $600,000.

The homebuilder was insured by a CGL policy. In a declaratory judgment action, the homebuilder's insurer sought to obtain a judgment of "no coverage" for the homeowner's judgment. In the trial court, the insurer lost. The trial court found that the homeowner's judgment was in fact covered by the homebuilder's CGL policy, meaning that the homebuilder's insurer must pay the underlying $600,000 judgment.

OWNERS I

On appeal, the homebuilder's insurer argued that the homeowner's judgment was not based on an "occurrence." In the initial opinion ("*Owners I*"), the Alabama Supreme Court agreed with the insurer. The Court stated, "We have previously considered the issue whether poor workmanship constitutes an occurrence and have held that, in each case, it depends 'on the nature of the damage caused by the faulty workmanship.'"[2] The Court explained the rule of "occurrence" as "faulty workmanship performed as part of a construction or repair project may lead to an occurrence if that faulty workmanship subjects personal property or other parts of the structure outside the scope of that construction or repair project to 'continuous or repeated exposure' to some other 'general harmful condition' and if, as a result of that exposure, that personal property or other unrelated parts of the structure are damaged."

...SOMETHING OTHER THAN THE HOUSE MUST BE DAMAGED IN ORDER FOR THERE TO BE AN "OCCURRENCE."

Thus, according to *Owners I*, for there to be an "occurrence," the property damage must have been to something outside the scope of the contractor's project. So, if the homebuilder's project was a house, something other than the house (or a component of the house) must be damaged in order for there to be an "occurrence." The decision did not explain how this rule fits the definition of "occurrence" as "accident," but rather sought to define "occurrence" as something other than "accident." Understandably, this decision was not well accepted by the losing parties or by the construction industry, who felt that it was both incorrect and would have a dramatically negative impact on the industry.

OWNERS II

Following the *Owners I* opinion, the losing parties filed an application for rehearing, supported by various amici curiae.[3] In a remarkable turn of events, the Alabama Supreme Court withdrew and replaced *Owners I* with a new opinion ("*Owners II*").[4]

In *Owners II*, the homeowner and homebuilder again argued that the damage to the house was "property damage" resulting from an "occurrence" and therefore covered under the homebuilder's CGL policy. This time, the Supreme Court accepted the argument. First, the Court noted that the policy defined "occurrence" as "an accident, including continuous or repeated exposure to the same general harmful conditions." Second, the Court rejected the insurer's argument that there may be an "occurrence" only to the extent that faulty workmanship results in damage to property outside the scope of the construction project. The Court explained:

"However, in making that argument Owners asks the term 'occurrence' to do too much. The term 'occurrence' is defined in the Owners policy simply as 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.' If some portion of the Owners policy seeks to affect coverage by references to the nature or location of the property damaged, it is not the provision in the policy for coverage of occurrences. The policy simply does not define 'occurrence' by reference to such criteria....Indeed, to read into the term 'occurrence' the limitations urged by Owners would mean that, in a case like this one, where the insured contractor is engaged in constructing an entirely new building, or in a case where the insured contractor is completely renovating a building, coverage for accidents resulting from some generally harmful condition would be illusory. There would be no portion of the project that, if damaged as a result of exposure to such a condition arising out of faulty workmanship of the insured, would be covered under the policy."

A critical point of *Owners II* is the Court's conclusion that "occurrence" is "simply an accident." After reaching that conclusion, however, the Court went on to reiterate its longstanding rule that "faulty workmanship itself is not 'property damage' 'caused by' or 'arising out of' an 'occurrence.'" Thus, the cost of repairing or replacing faulty workmanship "is not the intended object of a CGL policy issued to a builder or contractor."

THE ...POLICY MAY NOT PROVIDE COVERAGE FOR THE "FAULTY WORKMANSHIP" ITSELF, BUT IT MAY AND OFTEN DOES PROVIDE COVERAGE FOR PROPERTY DAMAGE RESULTING FROM THE FAULTY WORKMANSHIP.

As the *Owners II* opinion makes clear, the definition of "occurrence" as "accident" certainly does not negate coverage for property damage (including damage to the project itself) that is accidentally caused by faulty workmanship. In other words, the CGL policy may not provide coverage for the "faulty workmanship" itself, but it may and often does provide coverage for property damage resulting from the faulty workmanship. This is true even if the property damage is limited solely to the construction project. This conclusion in *Owners II* is a complete reversal from *Owners I*. It is also entirely consistent with the policy's plain language definition of "occurrence" as "accident" and with the clear majority of states that have definitively decided the issue.

Based on the foregoing, followed by an insightful analysis of the "your work" exclusion, the Supreme Court affirmed the trial court's judgment in favor of the insured homebuilder. Thus, the homeowner's entire $600,000 judgment against the homebuilder was found to be covered by the homebuilder's CGL policy. The judgment became final on June 27, 2014, when the Supreme Court overruled the insurer's final application for rehearing.[5] The insurer fully satisfied the judgment, plus interest, shortly thereafter.

CONCLUSION

"Occurrence" means "accident." "Accident" means "unexpected" or "unintended" or something similar. That is what the plain language of the standard CGL policy requires. With *Owners II*, the Alabama Supreme Court has brought Alabama law in line not only with the plain language of the CGL policy, but also with the overwhelming national majority. While the coverage analysis does not end with "occurrence," we can at least be assured that Alabama now correctly defines "occurrence" as "accident."

...THE ALABAMA SUPREME COURT HAS BROUGHT ALABAMA LAW IN LINE ...WITH THE OVERWHELMING NATIONAL MAJORITY

ENDNOTES

1 We will call this "*Owners I*." *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 2013 WL 5298575 (Ala. September 20, 2013).

2 Quoting *Town & Country Prop., LLC v. Amerisure Ins. Co.*, 111 So.3d 699, 705 (Ala. 2011).

3 Those filing amicus curiae briefs in support of the homeowner and homebuilder were: Alabama Associated General Contractors, Inc.; Greater Birmingham Association of Homebuilders; Associated Builders & Contractors of Alabama; Homebuilders Association of Alabama; and United Policyholders.

4 *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 2014 WL 1270629 (Ala. March 28, 2014), final app. for rehearing denied June 27, 2014.

5 The insurer's final application for rehearing was supported by amici curiae National Association of Mutual Insurance Companies and Property Casualty Insurers Association of America.