"OCCURRENCE" MEANS "ACCIDENT": A (MOSTLY) BANNER YEAR FOR CONTRACTORS ADVOCATING A PLAIN LANGUAGE INTERPRETATION OF THE CGL POLICY

By: Gregory A. Brockwell, *Leitman, Siegal, Payne & Campbell, P.C.*

Those representing contractors, property owners, and insurers in the area of "construction defects" are all too familiar with the diversity of law across the 50 states as to 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. For many years, the law has been inconsistent from state to state and subject to relatively frequent change.

The CGL policy basically defines "occurrence" as "accident," which should be an easy enough issue to interpret. Unfortunately, however, many courts in the past have failed to follow the policy's plain language definition of "occurrence" and have instead interpreted "occurrence" to mean something other than "accident."

For contractors and other policyholders who have long advocated for a plain language interpretation (*i.e.*, "occurrence" means "accident," as the policy plainly states), 2013 has been a banner year, with one exception. The following is a brief summary of the year's important state high court decisions, in chronological order.

In each of the cases below, the contractor's CGL policy included the standard insuring provision, covering damages because of "bodily injury" or "property damage" if such bodily injury or property damage were caused by an "occurrence." Each policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The word "accident" was not defined in the policy.

North Dakota:

K&L Homes, Inc. v. American Family Mutual Insurance Co., 829 N.W.2d 724 (N.D. 2013).

In this case, the homeowner purchased a newly-constructed house from a homebuilder. Not long after purchasing the house, the homeowner noticed cracks, unevenness, and shifting. The homeowner alleged that the house suffered damage because of "substantial shifting caused by improper footings and inadequately compacted soil under the footings and foundation." Such foundation work had been performed by a subcontractor.

The homeowner obtained a judgment against the homebuilder. The homebuilder's insurer denied coverage for the judgment. In the ensuing coverage dispute, the trial court concluded that "the deficient work of the excavation subcontractor was not an accident and did not constitute an 'occurrence'" under the homebuilder's CGL policy.

On appeal, the North Dakota Supreme Court noted that it had previously defined "accident" as "happening by chance, unexpectedly taking place, not according to the usual course of things."[1] The Court also noted that "the majority of state supreme courts who have decided the issue of whether inadvertent faulty workmanship is an accidental 'occurrence' potentially covered under the CGL policy have decided that it can be an 'occurrence.'"[2] The Court also noted that the history of the post-1986 CGL policy supports that a construction defect may be an "occurrence."[3]

The Court explained that its prior decision defining "occurrence" by the nature of the property damaged by a construction defect was "incorrectly decided."[4] "This focus on the nature of the property damaged to define whether there has been an 'occurrence' has been criticized by courts and commentators." The Court reasoned, "There is nothing in the definition of 'occurrence' that supports that faulty workmanship that damages the property of a third party is a covered 'occurrence,' but faulty workmanship that damages the work or property of the insured contractor is not an 'occurrence.'" Thus, whether or not there is an "occurrence" cannot be determined by that nature of the property damaged.

The Court finally concluded, "Faulty workmanship may constitute an 'occurrence' if the faulty work was 'unexpected' and not intended by the insured, and the

1 Quoting *Wall v. Pennsylvania Life Ins.*, 274 N.W.2d 208, 216 (N.D. 1979).

2 *See K&L*, 829 N.W.2d at 729-31, for a thorough survey of the decisions comprising the "majority."

3 *Id.* at 731-34 (discussing *United States Fire Ins. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007)).

property damage was not anticipated or intentional, so that neither the cause nor the harm was anticipated, intended, or expected." This rule, the Court explained, "is consistent with our definition of 'accident' for purposes of a CGL policy."

Connecticut:

Capstone Building Corp. v. American Motorists Insurance Co., 67 A.3d 961 (Conn. 2013).

In this case, the Connecticut Supreme Court was asked to answer several certified questions by an Alabama federal district court. Among those certified questions was, "Whether damage to a project contracted to be built, which was caused by defective construction or faulty workmanship associated with the construction project, may constitute 'property damage' resulting from an 'occurrence,' triggering coverage under a commercial general liability insurance policy?" This was an issue of first impression in Connecticut.

The case involved the construction of a student-housing project on the University of Connecticut ("UCONN") campus. Capstone Building Corporation served as the project's general contractor, but it did not self-perform any of the project work. All work was performed by subcontractors.

The contractor was covered by a CGL policy. In construing the policy, the Connecticut Supreme Court explained that it would give "accident" its natural and ordinary meaning—an "unexpected happening; unexpected or unintended." "A deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly."[5]

The Court concluded that a contractor's defective workmanship can give rise to an "occurrence." It reasoned that "occurrence" means "accident," and "accident" means "unexpected or unintended." Thus, because "negligent work is unintentional from the point of view of the insured," the Court found "that it may constitute the basis for an 'accident' or 'occurrence' under the plain terms of the commercial general liability policy."

West Virginia:

Cherrington v. Erie Insurance Property and Casualty Co., 745 S.E.2d 508 (W. Va. 2013).

In this case, an individual contracted with a homebuilder to construct a new home in Greenbrier County, West Virginia. After the completion of the home, the homeowner discovered various defects in the house, including an uneven concrete floor on the ground level; water infiltration through the roof and chimney joint; a sagging support beam; and numerous cracks in the drywall throughout the house. All of the defective work was performed by subcontractors.

The homebuilder was insured by a CGL policy. The insurer argued (and the trial court agreed) that "CGL insurance does not provide coverage for defective workmanship," relying on then-existing West Virginia case law.[6]

On appeal, the West Virginia Supreme Court revisited its previous decisions and appears to have been persuaded by the "majority of other states" that had reached the opposite conclusion. The Court stated, "While we appreciate this Court's duty to follow our prior precedents, we also are cognizant that *stare decisis* does not require this Court's continued allegiance to cases whose decisions were based upon reasoning which has become outdated or fallen into disfavor….Wisdom too often never comes, and so one out not to reject it merely because it comes late."

Thus, the Court reversed its previous decisions to hold that "defective workmanship causing bodily injury or property damage is an 'occurrence' under a policy of commercial general liability insurance." The Court reasoned that "occurrence" means "accident," and "accident" means that the damages must not have been "deliberate, intentional, expected, desired, or foreseen by the insured." The Court found it to be nonsensical that a contractor would deliberately intend "the deleterious consequences that were occasioned by its subcontractors' substandard craftsmanship," as such would amount to "deliberate sabotage." Thus, the Court found that the damages were "accidental" and not "deliberate, intentional, expected, desired, or foreseen" by the homebuilder. As such, because "occurrence" means "accident," there was an "occurrence."

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4 *Id.* at 735 (discussing *ACUITY v. Burd & Smith Constr.*, 721 N.W.2d 33 (N.D. 2006)).

5 Quoting *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1, 8 (Tex. 2007).

6 *See Corder v. William W. Smith Excavating Co.*, 556 S.E.2d 77 (W. Va. 2001).

Georgia:

Taylor Morrison Services, Inc. v. HDI-Gerling America Insurance Co., 746 S.E.2d 587 (Ga. 2013).

In this case, the Georgia Supreme Court was asked to answer certified questions by the U.S. Court of Appeals for the Eleventh Circuit. Among the certified questions was, "Whether, for an 'occurrence' to exist under a standard CGL policy, Georgia law requires there to be damage to 'other property,' that is, property other than the insured's completed work itself?"

The case involved a homebuilder and a class of 400 homeowners who bought homes from the homebuilder. The class alleged that the concrete foundations of their homes were improperly constructed, causing the foundations to fail. In turn, the failing foundations caused damage to the houses, including water intrusion, cracks in the floors and driveways, and warped and buckling flooring.

The homebuilder was insured by a CGL policy. The homebuilder's insurer sought a declaratory judgment of "no coverage" for the homeowners' claims. In the declaratory judgment action, the trial court granted summary judgment for the insurer, finding that the homeowners' claims did not involve an 'occurrence' because the only 'property damage' alleged was damage to the work of the homebuilder (i.e., the homes).

In answering the certified question, the Georgia Supreme Court began its analysis with the meaning of "accident," which it would give its usual and common meaning. According to the Court, an "accident" refers to "an unexpected happening without intention or design," an "event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result," or "something that occurs unexpectedly or unintentionally."

The Court explained that "accident" is not normally defined by the nature or extent of injuries. Therefore, the Court held that "occurrence" means "accident," which "does not require damage to the property or work of someone other than the insured." The Court reasoned that other courts are mistaken when they seek to define the full extent of coverage through a contorted definition of "occurrence." Rather, "The sounder analytical approach is to avoid conflating the several requirements of the insuring agreement and the exclusions, and instead, to let each serve its proper purpose."

According to the Court, the proper approach is reflected in the "strong recent trend in the case law that interprets the term 'occurrence' to encompass unanticipated damage to nondefective property resulting from poor workmanship."[7] "Most federal circuit and state supreme courts cases now line up in favor of finding an occurrence in the context of a claim by homeowners against an insured-homebuilder for damage to nondefective portions of a home resulting from the defective construction of another portion of the home."[8]

Alabama:

Owners Insurance Co. v. Jim Carr Homebuilder, LLC, No. 1120764, 2013 WL 529875 (Ala. September 20, 2013), *application for rehearing pending*.

Every rule has an exception, and for the year 2013 that exception is the State of Alabama. In an anomalous decision that bucks the modern trend, Alabama has decided that "occurrence" means something other than "accident." This places Alabama in the minority. However, as of the time of this writing, the decision has not yet been published, and an application for rehearing is pending.

In the 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.

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.

On appeal, the homebuilder's insurer argued that the homeowner's judgment was not based on an "occurrence." The Alabama Supreme 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.'"[9] The

7 Quoting *Greystone Constr., Inc. v. Nat. Fire & Marine Ins. Co.*, 661 F.3d 1272, 1282 (10th Cir. 2011).

8 *Id.*

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

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."

Thus, 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 does not explain how this rule fits the definition of "occurrence" as "accident," but rather seeks to define "occurrence" as something other than "accident."

Conclusion

"Occurrence" means "accident." "Accident" means "unexpected" or "unintended" or something similar. That is what the plain language of the standard CGL policy requires. Certainly the modern trend—and the national majority—follow such a plain language interpretation of "occurrence." This is reflected in the 2013 decisions of the high courts of Connecticut, Georgia, North Dakota, and West Virginia. For every rule, however, there is an exception. The policyholder should be cautioned that the interpretation may still vary from state to state. In a minority of states—including Alabama if its recent decision stands—"occurrence" may yet mean something other than "accident." ⚖

Gregory A. Brockwell is a business trial lawyer based in Birmingham, Alabama, as a shareholder of Leitman, Siegal, Payne & Campbell, P.C. His practice focuses on representing local individuals and businesses in disputes with their business partners, banks, insurance companies, competitors and the like. A particular focus is representing policyholders in insurance disputes. General practice areas include Business Torts and Corporate Litigation, Contract Litigation, Securities Litigation, Trust and Estate Litigation, Insurance/Bad Faith Litigation, and Shareholder Disputes. He is a Board Member of the Alabama State Bar's "Business Torts and Antitrust Section."