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Business Briefs
Legal Update

Do you have coverage for defective workmanship?

Understanding CGL policy coverage

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While commercial general liability policies have undergone revisions over the last several years, the standardized policies for the industry still routinely become the subject of legal battles regarding their coverage for defective workmanship. The answer to the question of coverage for defective workmanship depends upon the location where the work is being performed and specifically which state law is applied to the coverage question. While the majority of the states maintain a position that defective workmanship is *not* covered because it is not an "occurrence," there appears to be a growing number of states that embrace the position that there are some circumstances, particularly when the defective work is performed by subcontractors, that the defective workmanship *can* be covered. Since "occurrence" is defined in the policies as an accident, the court's decision usually turns on whether defective workmanship is in fact an accident. Other decisions turn upon whether or not the property damage caused by the defective workmanship is to the contractor's own work or to the work or property of others. While damage to "your work" is excluded, there is an exception to that exclusion if the work is done by others on your behalf, such as by subcontractors.

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In Ohio, the Supreme Court decided in *Westfield Insurance Company vs. Custom Agri Systems, Inc.* that within the plain meaning of the word 'accident' is the doctrine of fortuity, and therefore decided that claims for faulty workmanship do not have the fortuitous qualities needed for an 'accident'. The Court held that there is no occurrence and therefore no coverage. This decision was made in spite of the fact that the alleged damage in the case was caused by the subcontractor. While this opinion by the Ohio Supreme Court had many weaknesses, currently in the state of Ohio, claims of defective construction or workmanship brought by a property owner are not claims for "property damage" caused by an "occurrence" under a commercial general liability policy, and are not covered.

The Supreme Court in the state of Kentucky in 2011 similarly held that faulty construction and/or workmanship standing alone is not an 'occurrence' under a general liability policy. The Kentucky Supreme Court also found that the definition of accident included the issues of fortuity in that it required two central issues: intent and control. While a contractor may not intend to commit faulty construction or workmanship, the Court felt that since

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the contractor has control over construction and/or workmanship, therefore, there is no fortuity, or 'accident' that comes within the definition of an occurrence. This case also had its own weaknesses as well and it is expected that both Ohio and Kentucky's decisions will be challenged in the future.

Many supreme courts of other states in grappling with this issue, have in some cases promptly reversed their original finding that defective workmanship was not an occurrence, while others found that it was dependent on the nature of the property damage caused by the defective workmanship. Colorado has even gone so far as to pass legislation that simply defines 'occurrence' as an 'accident' eliminating any question for the courts to decide.

Since these general liability policies provide coverage for subcontractors with the subcontractor exception to the "your work" exclusion , and for coverage for damage to work other than "your work" (property of others), there should be no question that a commercial general liability policy contemplates coverage of defective workmanship under the appropriate circumstances.

As you can see, this area of the law is not as clear-cut as we would like and can vary on a state-by-state and case-by-case basis. Should you or your company have concerns or potential incidents regarding defective workmanship or construction please consult legal counsel.

***Len Weakley, Jr.'s** practice focuses on construction litigation, with an emphasis on architect and engineer liability and construction project disputes. He has extensive trial experience in the representation of architects and engineers, owners, and contractors in construction disputes, defect claims, delay claims, drafting and negotiating construction contracts, contractual disputes, and insurance coverage. LAW@Rendigs.com*