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Defining What Constitutes an Occurrence to Trigger a Policy, Determining Whether Endorsements or Exclusions Apply, Resolving Construction Defect Claims, and the Interplay with Performance Bonds

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Tweeting about this conference?

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Definitions of "Occurrence"

- Current ISO Form: 'Occurrence' means "an accident including continuous or repeated exposure to substantially the same general harmful conditions."

- Pre-1986 Form: 'Occurrence' means "an accident . . . Which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

- Variation: 'Occurrence' means "an accident or event or a continuous and repeated exposure to conditions . .

Legislation

- **Colorado: C.R.S. 12-20-808**: In interpreting a liability insurance policy issued to a construction professional, a court shall presume that the work of a construction professional that results in property damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured.

- **Arkansas: A.C.A. 23-79-155**: A commercial general liability policy must contain a definition of "occurrence" that includes "Property damage or bodily injury resulting from faulty workmanship." A.C.A. § 23-79-155(a)(2). The statute specifically provides: "(b) This section is not intended to restrict or limit the nature or types of exclusions from coverage that an insurer may include in a commercial general liability policy." A.C.A. § 23-79-155.

Legislation

- **South Carolina: SC Code 38-61-70**: CGL policies "shall contain or be deemed to contain a definition of 'occurrence' that includes; 1. an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and 2. property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself."

- **Hawaii: H.R.S. 431:1-217**: For purposes of a liability insurance policy that covers occurrences of damage or injury during the policy period and that insures a construction professional for liability arising from construction-related work, the meaning of then term "occurrence" shall be construed in accordance with the law as it existed at the time that the insurance policy was issued.

Multiple Occurrence Position & Impact on Settlement Negotiations

- Pressure on primary carrier(s) to pay aggregate limit when defense is outside of limits.
- Pressure on insured to satisfy multiple self insured retentions/retained limits.
- Asserted in support of argument that no single occurrence exceeds retained limit so neither duty to defend nor duty to indemnify attaches.

Occurrence Cases

- Chartis Specialty Ins. Co. v. Queen Anne HS, LLC. 867 F. Supp. 2d 1111 (W.D. Wash. 2012) (Satisfaction of a single $1m retained limit by settling a single issue in exchange for a promissory note triggered immediate duty to defend. Chartis' association of counsel did not satisfy defense obligation and breach was in bad faith.)

- Chartis Specialty Ins. Co. v. Am. Contractors Ins. Co. Risk Retention Grp. No. 3:13-CV-01669-KI, 2014 WL 3943722, at *1 (D. Or. Aug. 12, 2014) (“The [policy occurrence] definition directs that the cause of the property damage is to be viewed 'general[ly],' not separated into individual components, and 'substantially' the same cause will be viewed as one 'occurrence.' Additionally, the property damage caused by an injurious exposure to continuing conditions constitutes a single occurrence.

Occurrence Cases

- Lexington Ins. Co. v. Illinois Union Ins. Co.A-12-668035-C (Dist. Ct. Clark Cnty. Nev. Oct. 02, 2013) (“Read as a whole, the entire Complaint in Turnberry Towers concerns the alleged defective development of the entire project. The condominium project is a whole, more than an aggregation of its disparate parts, roof, curtain wall, electrical, and the like. Thus, irrespective of the number of subcontractors which worked on the project and irrespective of the level of detail in the defect lists prepared by experts for plaintiff in the Turnberry Towers action, the Turnberry Towers action involves a single source of liability; defective construction of the project. Indeed, under Nevada law the developer and general contractor can be held liable for all of the alleged defects in the project.”)

Occurrence Cases

- Lennar Corp. v. Great Am. Ins. Co. 200 S.W.3d 651 (Tex. App. 2006) abrogated on other grounds by Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118 (Tex. 2010) (Insured argued that installing EIFS in numerous homes was a single occurrence because the product defect was the cause of all the damage. The court rejected the insured's argument and concluded that the EIFS claim for each home constitutes a separate occurrence.)

Trigger

- When is an "occurrence" policy triggered?
  - Is it when the bodily injury or property damage *occurs?*
  - When does it *occur*?
  - What if no one saw it or had reason to know about it?
  - Can it happen during multiple policy periods?
  - How do we treat cumulative injury?

- Courts have *CREATED* jurisprudential answers.
  - In other words, the trigger is *not* in the policy.
  - Created to resolve the uncertainties.

- Four triggers: Exposure, Manifestation, Injury-In-Fact and Continuous Trigger.
  - Exposure is not typically applied to property damage.

- Triggers are ***highly state specific***.

Manifestation

- The CGL policy is triggered when the injury or damage is discovered, or manifests (or, in some states, is capable of being discovered.
- Only the policy in place *at the manifestation date* is triggered.
- Is Florida a manifestation state?

Injury-in-Fact

- CGL policies are triggered when the actual damage happened.
- Often requires expert analysis.
- All policies in effect during the time of the *actual injury* are triggered, even if the injury is continuous in nature.
- *Don's Bldg. Supply* (Tex. 2008)

Continuous Trigger Theory

- CGL policies are triggered if they are in effect during exposure period, actual damage or upon manifestation of damage. "Triple trigger."

- *Keene* (D.C. Cir. 1981), *Owens-Illinois, Inc.* (N.J. 1994): asbestos cases.

- *Montrose* (Cal. 1995): term "occurrence" is ambiguous.

Targeted Tenders

- Targeted tenders: can the insured decide which policy(ies) are triggered?

- *Cincinnati Cos.* (Il. 1998): Insurer's duty to defend is triggered by knowledge, but insurer must contact insured and offer. Insured may accept or reject offer. Additional insureds? Yes. Other insurers? No. Excess? Not until primary exhausted.

- Is Texas a targeted tender state?

Property Damage

- Insuring Agreement: “physical injury to tangible property, including all resulting loss of use….”
- How is this related to an “occurrence”?
- In many states, mere construction defect is not “property damage.”
- Can construction defect be an occurrence but not property damage? *Palm Beach Grading* (11th Cir. 2011)

Rip and Tear Damage

- Whether removal and replacement of non-defective property required to repair defect work is “property damage.”
- States differ.
- NOT covered: *Desert Mtn. Prop. Ltd. P’ship* (Ariz. App. 2010): expense of removing non defective property not covered. Also, NC, MD, UT.
- ARE covered: WA

What Are Business Risk Exclusions?

- Series of Exclusions in CGL Policy
- They only apply if the loss would otherwise be covered by the Insuring Agreement

Applying the Exclusions – Generally

- Is there "Property Damage?“
  - Is it “Physical Injury” to “Tangible Property”, or
  - Is it "Loss of Use" of Tangible Property

Applying the Exclusions – Generally

- What is Damaged?
  - The Named Insured's work (that now needs to be fixed) or
  - Other property in contact with the Named Insured's work?

Applying the Exclusions – Generally

- When did the damage occur?
  - During the Named Insured's Operations or after the Named Insured's Work is Complete?
- Is the Named Insured's Work Incomplete or Defective?

Exclusion J: Applies to:

- "owned" property -- damage should be covered

under first party policies

- "alienated" property -- property owned and then sold by the Named Insured

- "that particular part" of property "being worked on" by the Named Insured

- “that particular part” of property that must be repaired or replaced because of your work

(does not apply to completed work)

"Work-Product"

- Exclusion K
  - Damage to "your product"
  - Does not include real property
- Exclusion L
  - Damage to "your work"
  - Does not apply to damage to subcontracted work, and
    - Does not apply to damage caused by subcontractors

Sister Ship & Impaired Property

- Exclusion M –Sister Ship
  - Loss of Use caused by known or suspected defect (usually because an identical "sister ship" had an accident)

- Exclusion N – Impaired Property
  - Loss of Use caused by a defect, where defective work can be repaired/removed and host structure is unharmed

CURRENT (AND CONTINUING) ISSUES

- Is “faulty work” an occurrence?
- Is damage caused to other trades work when defective work is repaired excluded?
- Is drywall, e.g., “real property”?
- Did the damages arise out of “ongoing operations”?

AFFECT HOW DEFENSE COUNSEL HANDLES A CONSTRUCTION DEFECT CASE?

Resolving Construction Defect Claims

- Historical Perspective: The 1990's
  - Construction defect really started to build steam and the Montrose decision from California really set the table for what happened next, even to this day.
  - Montrose: the California Supreme Court held that in third-party liability cases where an occurrence causes damage over a number of years, all the policies in effect over that period are triggered for duty-to-defend purposes.
  - Construction Defect was a "California thing."

Resolving Construction Defect Claims

- Historical Perspective: The 2000's
  - Advent of Right to Repair Act in California (SB800) and other states.
  - New policy terms introduced, such as prior work exclusions, condominium exclusions, Wrap exclusions.
  - Expansion of Construction Defect claims to Nevada, Arizona, Florida and other places accelerate the growth of coverage opinions and new coverage terms.

Resolving Construction Defect Claims

- Present Day
  - Right to Repair Acts Like California's SB800 are a Mixed Bag
    - Some States Have Them, Some Don't
    - Many ineffective
    - *Liberty Mutual v. Brookfield* was death knell to California's SB800, as ineffective as it was.
  - As condo construction booms, we are going to see more cases involving design professionals
  - *Beacon v. Skidmore*: A sign of things to come nationally? Why is this issue important?
  - Where do suppliers fit into all of this?

Resolving Construction Defect Claims

- Biggest Headache and Challenge By Far Are Condo Conversions Because they Bring the following issues into play:
  - Condo exclusions
  - Wrap up exclusions
  - Prior work exclusions
  - Continuous and progressive loss exclusions
  - Design / professional services exclusions plus
  - “Other” insurance issues
  - Occurrences
  - Deductibles
  - Excess provisions on Ultimate Net Loss

Resolving Construction Defect Claims

- Some tips from the trenches:
  - Keep your builder client in the loop on your strategy and keep them involved at every turn
    - Shocking how often this does not happen
  - As defense counsel, I want to know the coverage issues so I can try figure out a way to resolve the case
  - Have a good team and meet with them regularly
  - Got to get to the root of the claims as quickly as possible with a quality expert

Resolving Construction Defect Claims

- Some tips from the trenches:
  - Work with opposing counsel on finding a responsible joint repair whenever possible
  - Don't be afraid to give bad news and FINALLY
  - When providing your damages assessment:
    - it's all about the verdict exposure,
    - it's not about what is or is not covered. That's the job of the others on this panel.