

Court Gets in Line with Majority of Jurisdictions on Faulty Products Coverage

By Joseph D. Jean and Matthew D. Stockwell

A recent decision from an appellate court in Pennsylvania is good news for policyholders who manufacture products, as yet another jurisdiction joins the majority view that product manufacturers may be covered for damage that can be linked to their products under commercial general liability (CGL) policies.

Background

In *Indalex Inc. v. National Union Fire Insurance Co.*¹, several lawsuits were filed against Indalex, alleging that windows and doors it supplied to a residential construction project were defectively designed or manufactured, resulting in water leakage that caused physical damage to the underlying plaintiffs' residences, as well as personal injuries in some instances. Many contractors also impleaded Indalex into lawsuits brought by homeowners directly against them. The primary insurer, One Beacon, defended and indemnified Indalex in these lawsuits. But when its policy limits were exhausted, National Union, the umbrella insurer, refused to defend and indemnify Indalex. Relying upon *Kvaerner*² and its progeny, it claimed that faulty workmanship and product defects do not qualify as an "occurrence" under the National Union policy.

Indalex brought a coverage action against National Union. The trial court agreed with National Union's position, and granted its motion for summary judgment. On appeal, the court's focus was whether Indalex's workmanship could constitute an "occurrence."

The National Union policy defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in Bodily Injury or Property Damage neither expected nor intended from the standpoint of the Insured."

¹ 2013 Pa Super. 311 (December 3, 2013).

² *Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Co.*, 908 A.2d 888 (Pa. 2006).

Superior Court's Decision

Pennsylvania courts have previously confused the “occurrence” issue, holding that faulty workmanship does not constitute an “occurrence” under a typical CGL policy. These courts have incorrectly reasoned that faulty workmanship to work product itself is a contractual issue between two parties, not contemplated by CGL coverage.³ But in *Indalex*, the court shifted course from this trend toward the majority view, and noted that the damage was caused by an “off-the-shelf product” (windows and doors) that failed. The court construed the product’s failure as an “active malfunction,” distinguished it from faulty workmanship, and noted that the product caused damage to other property.

As a result, the *Indalex* court held that National Union was required to defend Indalex with regard to the underlying claims of property damage and personal injury. “Simply stated, because Appellants set forth tort claims based on damages to persons or property, other than the insured’s product, we cannot conclude that the claims are outside the scope of the coverage.”

Outlook

This is an important decision, especially for manufacturers who supply products that are used in construction projects. The critical distinction is that where a faulty product causes harm to other property, a CGL policy may provide coverage, because the damage to the “other property” constitutes an “occurrence.”

Many state supreme courts (for example, Connecticut, North Dakota, and West Virginia) have, in the past year, determined that faulty workmanship can be an occurrence, particularly where it causes unintended and unexpected damage to other property. And, some states have even enacted legislation requiring CGL policies to define occurrence to include property damage or bodily injury resulting from faulty workmanship, or have made it easier for insureds to obtain coverage for damages as a result of work the insureds performed (for example, Arkansas, South Carolina, Colorado and others). New Jersey also recently introduced legislation seeking to require CGL insurers to alter the definition of “occurrence” to include property damage from faulty workmanship.

Although the *Indalex* decision centered around faulty products, a parallel can be drawn between a faulty product and faulty workmanship, both of which may cause similar unintended damage. At the least, this decision widens coverage for policyholders, and appears to be a step in the right direction toward the majority view nationwide, that CGL policies should cover faulty workmanship that causes damage to other property.

³ For example, in *Millers Capital Insurance Co. v. Gambone Bros. Development Co., Inc.*, 941 A.2d 706 (Pa. Super. 2007), the court held that homes built with defective stucco exteriors, windows, and other artificial seals causing water damage to the interiors were not covered by the developer’s CGL policy, because the product itself was the home, and that faulty workmanship could not constitute an occurrence.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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