Delaware District Court Finds CGL Insurer Owes Condo Builder a Duty to Defend Faulty Workmanship Claims — Based on the Subcontractor Exception to the Your Work Exclusion

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On September 7, 2021, in one of the few decisions addressing the scope of coverage for faulty workmanship under Delaware law, the Delaware District Court denied an insurer's motion seeking a declaration that it neither needed to defend nor indemnify an insured-builder under a commercial general liability policy.

In this declaratory judgment action, *Pennsylvania National Mutual Casualty Insurance Company v. Zonko Builders,* the insurer argued that the ongoing underlying action failed to properly plead an "occurrence" in a case alleging damages to a condominium caused by faulty workmanship involving subcontractors.* Zonko Builders (Zonko) served as the general contractor, supervising subcontractors. The Condominium Association sued Zonko for damages allegedly resulting from design and construction deficiencies. The motion was opposed by the Condominium Association, which cross-moved for partial judgment on the pleadings.

In *AE-Newark Associates, L.P. v. CNA Insurance Companies,* 2001 Del. Super. LEXIS 370 (Del. Super. Ct. Oct. 2, 2001), the Delaware Superior Court found that an insured was entitled to coverage for damages arising from a faulty roof system installed by a subcontractor on behalf of the insured general contractor.

Although the CGL policy at issue defined an "occurrence" as an accident, the policy also contained an endorsement providing that damages because of property damage to "your work" shall be deemed to be caused by an "occurrence" if the damage was performed on the insured's behalf by a subcontractor. Nonetheless, the insurer argued that it owed no coverage because faulty workmanship is not an occurrence.

Relying on the 20-year old holding in *AE-Newark Associates,* as well as a number of out-of-state opinions, the Delaware District court in *Zonko* noted:"[w]hile we are mindful Delaware Courts have rejected a definition of 'occurrence' which includes faulty workmanship, we note no Delaware court analyzed the interplay of subcontractor exceptions and the term 'occurrence.'" The court went on to explain that "if the Policy does not cover subcontractors' faulty work, the Policy's Your Work Exclusion need not specifically except subcontractors' work. Such an interpretation contravenes Delaware law by rendering the Subcontractor Exception mere surplusage." Thus, the court found that the Policy's endorsement provided support to the fact that the definition of "occurrence" included subcontractors' faulty work.

The court denied the motion as to the insurer's duty to indemnify and dismissed the Condominium Association's counterclaims, concluding that the Association lacked standing and the duty to indemnity issue was still unripe.

The *Zonko* opinion provides insurers with cautionary guidance that, in drafting an exclusion, an insurer may unwittingly provide an insured or court with ammunition to argue/find that the insuring agreement is otherwise broader than the insurer perhaps intended.

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