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Connecticut Supreme Court, in a Case of First Impression, Holds Negligent Construction Insured Under General Liability Policy

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In *Capstone Building Corp. v. American Motorists Insurance Co.*, 67 A.3d 961 (Conn. 2013), the Supreme Court of Connecticut held, in a case of first impression, that commercial general liability insurance policies may cover allegations that a subcontractor's unintended defective construction work damaged non-defective property. The court's opinion joined a growing number of decisions holding negligent construction is insured under general liability policies, and added more counterweight to decisions, such as *Kvaerner*, which was and remains the bulwark of the insurance industry's attempt to avoid coverage for such claims.[1]

In *Capstone*, Capstone Building Corporation and Capstone Development Corporation (collectively, "Capstone") served as the general contractor and project developer for construction at the University of Connecticut ("U. Conn."), which purchased a commercial general liability insurance policy from a predecessor of American Motorists Insurance Company ("AMICO"). *Id.* at 968. Capstone sought coverage from AMICO as an additional insured when U. Conn. alleged construction defects, but AMICO denied coverage on the ground that the policy did not cover alleged defects arising from Capstone's own work. *Id.* at 971.

The Supreme Court began by analyzing whether defective construction can constitute an "occurrence," which the policy defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 973–74. Prior Connecticut precedent established the term "occurrence" refers to "something that happens unexpectedly without design" and that "accident," which the policy did not define, means "an unexpected happening." *Id.* at 974–75. In addition, under Connecticut law an accident is an event that is unintended from the standpoint of the policyholder and, thus, even a deliberate act qualifies as an accident if the effect is unintended. *Id.* at 975. Applying those principles, the Supreme Court held negligent construction may satisfy the definition of "occurrence" to the extent it is unintentional from the standpoint of the policyholder. *Id.*

Next, the Supreme Court addressed whether U. Conn.'s allegations of defective construction qualified as "property damage." *Id.* at 976. At the outset, the Supreme Court noted the policy's definition of "property damage"—which was "physical injury to tangible property, including all resulting loss of use of the property" and "loss of use of tangible property that is not physically injured"—did not differentiate between damage to the contractor's work and damage to other property. *Id.* (internal citation and quotation marks omitted). Applying the definition, the Supreme Court held damage such as water and mold intrusion qualified as "property damage," but the

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

alleged escape of carbon monoxide fumes, building code violations, and deficiencies that did not damage other, non-defective property did not. *Id.* at 979–80.

The Supreme Court then considered the "Damage To Your Work" exclusion, which provides:

> "'Property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'
>
> "This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."

Id. at 983. Based on its language, the Supreme Court stated the exclusion "eliminate[s] coverage for property damage caused by an insured contractor's work, but restore[s] coverage for property damage caused by a subcontractor's work." *Id.* Whether a subcontractor performed the work that led to the defects alleged by U. Conn. was an issue of fact. *Id.* at 984.

Finally, the Supreme Court rejected AMICO's argument that requiring commercial general liability policies to cover defective construction of the policyholder's property would convert such policies into performance bonds. *Id.* In so concluding, the Supreme Court stated overlapping coverage does not negate the express terms of a commercial general liability policy. *Id.* Moreover, the Supreme Court noted surety bonds and commercial general liability policies differ in important ways. *Id.* at 985. Surety bonds, for instance, are intended to guaranty completion of a construction project rather than remedy property damage.[2] *Id.*

The decision in *Capstone* is part of a growing trend in recent years of courts holding negligent construction defects can be covered under general liability policies.[3] That trend has created a strong majority finding in favor of coverage. Perhaps more important, with the *Chenington* and *Capstone* decisions in West Virginia and Connecticut, states near Pennsylvania—home of *Kvaerner*, which is arguably the most pro-insurance company decision on this issue[4]—might be turning the tide towards policyholders, and might portend a change in Pennsylvania as well.

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2 The Supreme Court also held Connecticut does not recognize a cause of action for an insurer's bad faith claim investigation and that, when attempting to secure coverage for a settlement, the policyholder has the burden to prove the settlement is reasonable in proportion to the insurer's liability under its duty to defend. *Id.* at 969.

3 *See Chenington v. Erie Ins. Prop. & Cas. Co.*, 745 S.E.2d 508 (W. Va. 2013); *K&L Homes, Inc. v. Am. Family Mut. Ins. Co.*, 529 N.W. 2d (N.D. 2013).

4 Eric A. Fitzgerald, *Pennsylvania Stands Out Nationwide in Coverage Disputes Regarding Faulty Workmanship*, DEF. DIG., Sept. 2010, at 21, 23.

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