

## [Negligent Design and Construction Is Not an Occurrence of Property Damage](#)

### ***Insurance Law Update***

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U.S. Court of Appeals for the Fifth Circuit

In *VRV Development L.P. v. Mid-Continent Cas. Co.*, \_\_\_ F.3d \_\_\_, 2011 WL 48897 (5<sup>th</sup> Cir. (Tex.) January 7, 2011), the Fifth Circuit Court of Appeals held that negligent design and construction is not an “occurrence” that resulted in “property damage” within the meaning of a commercial general liability (CGL) policy issued by Mid-Continent Casualty Company to VRV Development L.P. As such, the court concluded that Mid-Continent had no duty to defend or indemnify VRV for a lawsuit alleging property damage resulting from the collapse of retaining walls constructed by VRV, when the collapse occurred after the policy periods.

Mid-Continent’s policy was effective from May 25, 2004 to May 25, 2005, and renewed through May 25, 2006. In 2004, VRV hired subcontractors to design and build retaining walls on residential lots. A homeowner’s inspection between May and July 2006 identified a crack in one of the retaining walls. In January and March 2007, after periods of heavy rainfall – and after the policy expired – the retaining walls collapsed. The homeowners sued VRV and Mid-Continent denied VRV’s tender of defense and indemnity.

In VRV’s ensuing coverage action, the district court granted summary judgment for Mid-Continent and the Fifth Circuit affirmed. The appellate court held that there was no coverage under the Mid-Continent policies because the alleged property damage in the underlying lawsuit was the collapse of the retaining walls in 2007, which occurred after the expiration of the Mid-Continent policy. The court rejected VRV’s argument that the property

damage was the crack in the retaining wall such that there was an occurrence during the policy period. The court stated that it “must focus on the time of the actual physical damage to the property, and not the time of the negligent conduct or the process that later results in damage.”

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