

## South Carolina Supreme Court Decision Analyzes Insurance Coverage for Progressive Damage Cases

The South Carolina Supreme Court has issued an opinion holding that defective construction resulting in property damage to non-defective components may be covered by a general liability policy. On August 22, 2011, the court withdrew its January 7, 2011, opinion in *Crossmann Communities v. Harleysville Mutual Insurance Company* and replaced it with an opinion that is essentially a complete reversal of the withdrawn opinion.

The issue to be decided was whether a general liability policy provided coverage for progressive damage caused by water penetration which resulted from defective construction. In the initial *Crossmann* opinion, the court found defective construction was not an occurrence because it lacked the "accident" portion of the definition of "occurrence." In the substituted opinion, the court reversed itself. The court noted an "occurrence" was once simply defined as an "accident." However, in 1966, the definition of an "occurrence" was expanded to include "continuous or repeated exposure to substantially the same general harmful conditions." The court conceded that it had, along with other courts, struggled to discern the meaning of the expanded occurrence definition in the context of progressive damage cases. The court concluded in its August decision that the lack of a clear meaning left an ambiguity that must be construed against the insurer, stating, "In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute property damage, but the defective construction would not."

In the second significant holding in *Crossmann*, the court rejected "joint and several liability" for insurers providing coverage in a progressive damage suit, instead adopting a "time on risk" framework. In so doing, the court overruled *Century Indemnity Co. v. Golden Hill Builders, Inc.*, 348 S.C. 559, 561 S.E. 2d 355 (2002), and *Century Indemnity's* apparent adoption of the "joint and several" framework. The "time on risk" rule limits an insurer's exposure to damage that takes place during the policy period. It also requires a policyholder to bear a pro rata portion of the loss corresponding to any portion of the progressive damage during which the policyholder was not insured or purchased insufficient insurance.

Courts adhering to the "joint and several" theory require each triggered insurer to indemnify its policyholder for the entire loss caused by progressive damage, up to the policy limit. The policyholder is often permitted to target the policy from which it will seek indemnity. That insurer may then seek partial reimbursement from other insurers. The *Crossmann* opinion rejected that approach as ignoring the policy language limiting the insurer's obligation to pay sums attributable to property damage that occurred during the policy period.

The court then gave guidance to the trial courts on how to apply the "time on risk" approach. The court noted an ideal application of the approach would require the fact finder to determine precisely how much of the injury-in-fact occurred during each policy period. The court recognized this was often both scientifically and administratively impossible.

In cases where it was impossible to know the exact measure of damages attributable to the injury, courts have divided the total incurred as a result of the property damage and then devised a formula to divide that loss in a manner that reasonably approximates the loss attributable to each policy period. The formula consists of the number of years an insurer provided coverage divided by the total number of years during which the damage progressed, which is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury. The court noted this is a default rule that assumed the damage occurred in equal proportions; however, if proof is available showing the damage progressed in some different way, then the allocation of losses would need to conform to that proof.

Turning to the underlying facts in *Crossmann*, the court noted a strict application of the "time on risk" formula might be inappropriate. In the underlying case, there were numerous buildings involved that each had their own certificates of occupancy. The parties stipulated the damage began within 30 days after the

certificate of occupancy was issued for each building. Thus, as to each building, each policy may be "on the risk" for a slightly different proportion. The court left it to the trial court to determine a reasonable methodology for resolving the damages issue.

Notably, the decision largely obviates South Carolina Code § 38-61-70, signed into law this summer, which was rushed through the legislature in response to the initial *Crossmann* opinion. Section 38-61-70 defines "Commercial General Liability" policies of insurance as they relate to construction professionals. The statute provides that commercial general liability insurance 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.

In footnote six of the opinion, the *Crossmann* court noted it did not address "recent legislation that seeks in part to impose a construction on existing insurance policies in pending actions." Subsequent to the passage of the legislation, Harleysville filed suit in the Supreme Court's original jurisdiction seeking a finding, among other things, that retroactive application of the legislation was unconstitutional. The *Crossmann* opinion likely renders the suit moot.

In conclusion, South Carolina rejoins those jurisdictions holding that general liability policies may provide coverage for resulting damage in progressive injury construction defect cases. Fortunately, an insurer's exposure is now limited to the resulting damage that takes place during the policy period. Insurers are no longer potentially liable for all of the damage simply as a result of having coverage for a limited portion of a larger period of resulting damage.

For more information, contact Collins & Lacy Insurance Coverage Practice Group Chair [Pete Dworjanyn](#) at [pdworjanyn@collinsandlacy.com](mailto:pdworjanyn@collinsandlacy.com) or (803) 255-0404.