Occurrences in Construction Defects Claims

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- Memberships:
  - California State Bar, 1994
  - Hawai'i State Bar, 2006
  - District of Columbia Bar, 2007
  - Nevada Star Bar, 2008
  - LA County Bar Association
  - Cark County Bar Association
  - South Bay Bar Association
  - Defense Research Institute
  - Construction Law Section, Nevada State Bar
  - Insurance & Health Law Section, Nevada State Bar
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- Recent Publications:
  - Meeting the Challenges of Raising Insurance Issues at Mediation, DRI In-House Defense Quarterly, Autumn 2011
  - Hot Topics in Construction Defect Litigation and Related Insurance Coverage Issues, Nevada State Bar, October 2011
  - The Fun Never Ends – Key Insurance Coverage Developments from 2009 to 2010, DRI, September 2010
  - The ABC's of Analyzing a Liability Insurance Policy, Nevada State Bar, June 2010

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Overview of Insurer's Perspective

- "Occurrence" Related Case Law
- Contract Interpretation
- Case Comment: Weedo
- Case Comment: J.S.U.B.
- Case Comment: Fire Insurance Exchange
- Case Comment: Specialty Services
- Single versus Multiple Occurrences

"Occurrence" Related Case Law

- Case law undeveloped in many states
- Existence versus number of occurrences
- Fundamental nature of "occurrence" issue

-Per occurrence limit
-Deductible/SIR
-Coverage determinative

Malleable concept

"Occurrence" Related Case Law

- Case law undeveloped in many states
- Existence versus number of occurrences
- Fundamental nature of "occurrence" issue
- Insuring agreement analysis, not exclusionary

Deletion of "expected or intended" language

-Property damage
-Occurrence
-Trigger of coverage
-Known losses

"Occurrence" Related Case Law

- Case law undeveloped in many states
- Existence versus number of occurrences
- Fundamental nature of "occurrence" issue
- Insuring agreement analysis, not exclusionary
- Deliberate acts, unexpected or unintended losses
- "Occurrence" as causative event, e.g., liability-producing act
- Negligence not synonymous with "occurrence" or accident

Contract Interpretation

- Accident is not ambiguous in CD context
- Contra Proferentem: ambiguities interpreted against insurer
- Doctrine of Reasonable Expectations
- Three-part rule of interpretation:

1. Plain meaning governs: The terms must be read in their "ordinary and popular sense" in the context of the policy as a whole and the circumstances of the case.

Contract Interpretation

- Accident is not ambiguous in CD context
- Contra Proferentem: ambiguities interpreted against drafter
- Doctrine of Reasonable Expectations
- Three-part rule of interpretation:

2. Objective reasonable expectations: A true ambiguity must be interpreted in the sense the insurance company reasonably believed the policyholder understood the disputed policy language when the policy was issued, i.e., in accordance with the insured's objectively reasonable expectations.

Contract Interpretation

- Accident is not ambiguous in CD context
- Contra Proferentem: ambiguities interpreted against drafter
- Doctrine of Reasonable Expectations
- Three-part rule of interpretation:

> 3. Contra-Insurer Rule: If the previous rule fails to resolve the ambiguity or uncertainty, the ambiguous language is resolved against the insurer as the drafter of the policy. AIU Ins. Co. v. Sup.Ct. (FMC Corp.) (1990) 51 Cal.3d 807, 821-822.

Case Comment: Weedo

- 405 A.2d 788 (New Jersey 1979)
- "[T]he question is whether th[e] policy indemnifies the insured against damages in an action for breach of contract and faulty workmanship on a project, where the damages claimed are the cost of correcting the work itself."

> "While it may be true that the same neglectful craftsmanship can be the cause of both a business expense of repair and a loss represented by damage to persons and property, the two consequences are vastly different in relation to sharing the cost of such risks as a matter of insurance underwriting." Id. at 791.

Case Comment: Weedo

- 405 A.2d 788 (New Jersey 1979)
- "[T]he question is whether th[e] policy indemnifies the insured against damages in an action for breach of contract and faulty workmanship on a project, where the damages claimed are the cost of correcting the work itself."

> "The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. " Id.

Case Comment: J.S.U.B.

- 979 So.2d 871 (Fla. 2007)
- Case precedent shows the Court's holding was based upon a different definition of "occurrence"

> Definition of "Occurrence": "As defined in the policies, an 'occurrence' is 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'" U.S. Fire Insurance Co. v. J.S.U.B., Inc., 979 So.2d 871 (2007).

Case Comment: J.S.U.B.

- 979 So.2d 871 (Fla. 2007)
- Case precedent shows the Court's holding was based upon a different definition of "occurrence"

J.S.U.B.'s Rationale: "The polic[ies] … define 'occurrence' as an 'accident' but leave 'accident' undefined. Thus, under our decision in CTC Development, these policies provide coverage not only for 'accidental events,' but also injuries or damage neither expected nor intended from the standpoint of the insured." J.S.U.B., Inc., 979 So.2d at 883.

Case Comment: J.S.U.B.

- 979 So.2d 871 (Fla. 2007)
- Case precedent shows the Court's holding was based upon a different definition of "occurrence"

> CTC Development: "[B]eing susceptible to varying interpretations, [the undefined term 'accident'] encompasses not only 'accidental events,' but also injuries or damage neither expected nor intended from the standpoint of the insured. This definition comports with the language used in standard comprehensive general liability policies and with the definition of the term 'accidental' set forth in Dimmitt as 'unexpected or unintended.'" State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1076 (Fla. 1998).

Case Comment: J.S.U.B.

- 979 So.2d 871 (Fla. 2007)
- Case precedent shows the Court's holding was based upon a different definition of "occurrence"

Policy Definition in Dimmitt: "[A]n accident including continuous or repeated exposure to conditions, which result in BODILY INJURY or PROPERTY DAMAGE neither expected nor intended from the standpoint of the INSURED..." Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp. (Fla. 1993) 636 So.2d 700, 702

Case Comment: J.S.U.B.

- 979 So.2d 871 (Fla. 2007)
- Case precedent shows the Court's holding was based upon a different definition of "occurrence"
- Faulty legal reasoning, unpersuasive precedent
  - *J.S.U.B. relied on holding in CT Development*
  - *CT Development relied upon holding in Dimmett*
  - *Dimmett interpreted different policy language*
  - *CT Development's facts show no accident happened*

Case Comment: Fire Insurance Exchange

- 104 Cal.Rptr.3d 534 (Cal. Ct. App. 2010)
- Homeowners mistakenly built on their neighbor's property

> Focus upon the act: "Where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an 'accident' merely because the insured did not intend to cause injury. Indeed, it is well established in California that the term 'accident' refers to the nature of the act giving rise to liability; not to the insured's intent to cause harm." Id. at 537.

Case Comment: Fire Insurance Exchange

- 104 Cal.Rptr.3d 534 (Cal. Ct. App. 2010)
- Homeowners mistakenly built on their neighbor's property

Court's Rationale: "[The homeowners] intended to build the house where they built it. Accepting their contention that they believed they owned the five and one-half foot strip of land and had the legal right to build on it, the act of construction was intentional and not an accident even though they acted under a mistaken belief that they had the right to do so." Id. at 540.

Case Comment: Specialty Services

- (3rd Cir. 2010) 609 F.3d 223 (Penn. law)
- Installation of outdoor synthetic turf with splits in the subsurface impermeable membrane
- Defects caused drainage system to fail leading to the settlement of the subgrade and an uneven, unstable field surface

Holding: Pennsylvania law interprets "occurrence" such that "in order for a claim to trigger coverage, there must be a causal nexus between the property damage and an 'occurrence,' i.e., a fortuitous event. Faulty workmanship, even when cast as a negligence claim, does not constitute such an event; nor do natural and foreseeable events like rainfall." Id. at 231.

Single versus Multiple Occurrences

- Developing nature of related case law
  - *Earlier cases favored policyholders re: deductibles*
  - *Two lines of case law developed: cause vs. effect*
  - *Carriers employed earlier holdings to enforce per occurrence limit*
  - *Application to Self-Insured Retentions Endorsements*
- Statement of the two rules:

> Effects Test: The determinative factor is the effect of an accident or event, with each resulting injury or instance of damage constituting a separate occurrence. Nicor, Inc. v. Associated Elec. & Gas Ins. Services Ltd., 223 Ill. 2d 407, 418-20, 860 N.E.2d 280, 287-88 (2006).

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> Cause Test: The majority of jurisdictions have adopted the "cause test" wherein the courts look to the cause of injury rather than its injurious effects to determine the number of occurrences. Chemstar, Inc. v. Liberty Mut. Ins. Co., 797 F. Supp. 1541, 1545-47 (C.D. Cal. 1992) aff'd, 41 F.3d 429 (9th Cir. 1994).

Single versus Multiple Occurrences

- Whittaker Corp. v. Allianz Underwriters, Inc. (1992) 11 Cal.App.4th 1236 (Cal. law)
  - *Defective panels sold and installed in 1,400 vehicles*
  - *One $5,000 deductible chargeable despite multiple injuries*
- Chemstar, Inc. v. Liberty Mut. Ins. Co. (9th Cir. 1994) 41 F3d 429, 433 (Calif. law)
  - *Manufacturer sued for defective plaster in 28 homes*
  - *One deductible because all damages resulted from same cause, i.e., failure to provide warning*
- U.E. Texas One-Barrington, Ltd. V General Star Indemnity Co., (5th Cir. 2003) 332 F.3d 274 (Texas law)
  - *19 apartment buildings sustained damage from leaking pipes*
  - *19 deductibles owed because focus on event giving rise to liability*