BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow

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Sweet Carolina For Policyholders: Good Times Will Never Seem So Good For Construction Defect Claims

South Carolina Supreme Court Withdraws <u>Crossmann Communities</u> and Allows Coverage for Consequential Damages of Construction Defects

Court Adopts Time on the Risk Allocation

Earlier today the Supreme Court of South Carolina issued its opinion in the very closely-watched case of *Crossmann Communities v. Harleysville Mutual Ins. Co.* There were twelve *Amicus* briefs filed with court. Twelve. That's almost 2 ½ briefs for each Justice. That's four briefs for every person I've ever met from South Carolina.

The South Carolina high court issued its first decision in *Crossmann Communities* in January. The Supreme Court overruled its 2009 decision in *Auto Owners Ins. Co. v. Newman* and held that "where the damage to the insured's property [project] is no more than the natural and probable consequences of faulty workmanship such that the two cannot be distinguished, this does not constitute an occurrence."

In other words, *Crossmann* essentially eliminated coverage for the consequential damages of faulty workmanship. This brought an immediate firestorm from the construction community. So much so that in May, Governor Haley signed into law § 38–61-70 of the South Carolina Code. Under this statute, "property damage" *resulting from* faulty workmanship is deemed to be an "occurrence." Under *Crossmann*, the law is just the opposite (in many situations). Thus, the construction defect statute restored the coverage – that was eliminated by *Crossmann* -- for "property damage" that is the consequence of/resulting from faulty workmanship.

While all this hubbub was going on, the Supreme Court granted re-hearing in *Crossmann Communities.* The court issued its decision today. The court withdrew its January opinion in *Crossmann* and held as follows:

Returning to Newman and viewing those facts through the lens of both "property damage" and "occurrence," we clarify that the costs to replace the negligently constructed stucco did not constitute "property damage" under the terms of the policy. The stucco was not "injured." However, the damage to the remainder of the project caused by water penetration due to the negligently installed stucco did constitute "property damage." Based on those allegations of property damage and construing the ambiguous occurrence definition in favor of the insured, the insuring language of the policy in Newman was triggered by the property damage caused by repeated water intrusion.

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. We find the expanded definition of "occurrence" is ambiguous and must be construed in favor of the insured, and the facts of the instant case trigger the insuring language of Harleysville's policies. We note, however, that various exclusions may preclude coverage in some instances. Because the parties in the present case stipulated not to raise the issue, we do not address any policy exclusions and exceptions.

Crossmann at 6-7.

Putting aside the combined "occurrence" and "property damage" rationales that the court adopted and what that can mean – which I'm still thinking about – the court essentially held that, while no coverage is owed to an insured for defective construction, coverage is owed for the consequential damages of defective construction.

The court's decision made no mention of the recently adopted South Carolina statute, except to say that it would make no mention of it.

Having now found that some coverage was owed, the South Carolina Supreme Court was required to address the method of allocation for multiple triggered policies. The court rejected "all sums" and adopted time on the risk. This is a lengthy part of the opinion and I leave it for another day.

The construction defect coverage situation in South Carolina has received a lot of attention. In my view – that has less to do with South Carolina's individual importance as a coverage jurisdiction (sorry 3 people that I've ever met from South Carolina) and more to do with it generally demonstrating and bringing attention to the complexity and lack of agreement that exists over coverage for construction defect claims. Consider that the Supreme Court of South Carolina issued *Newman* in 2009. The court overruled it in January 2011. The South Carolina legislature then un-overruled Newman (not sure that's a word) in May 2011. The South Carolina Supreme Court then un-overruled its overruling of *Newman* in August 2011. Got it?

A copy of today's Supreme Court of South Carolina decision in *Crossmann Communities v. Harleysville Mutual Ins. Co.* can be accessed here:

http://www.judicial.state.sc.us/opinions/displayOpinion.cfm?caseNo=26909

Please let me know if you have any questions.

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