BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
White and Williams LLP
Randy J. Maniloff
maniloffr@whiteandwilliams.com

June 19, 2011

Book 'em Danno-ccurrence: Hawaii Passes Law To Address Coverage For Construction Defects

Governor signs bill sort-of defining "occurrence" in the Aloha State

The debate whether faulty workmanship qualifies as a Don Ho-ccurrence continues to rage luau of control. Oahu knows what the next development is going to be. Certainly not Lanai. All Maui can do is speculate and lei odds. For the most part we are in limbo. Lately there has been a surfeit of legislation designed to solve the problem. This wave seems poised to continue. For other states the waikiki to the solution have been attempts by courts to clarify the issue. It is driving everyone bananas. Hawaiians have just said aloha to Act 83. It offers a hybrid approach to the problem – the legislature defined "occurrence," but did so with resort to case law. McGarr-it is certainly interesting. Let's tikki look.

The objective of this issue of *Binding Authority* is not to belabor the new Hawaii legislation. It is interesting, but no doubt will impact only a handful of readers. The real point is to declare that, with this new legislation, the state of the law concerning the availability of coverage for construction defects has now reached an all-time fracture. First a look at the Hawaii legislation and then an attempt to demonstrate the morass that CD coverage has become.

Hawaii's New CD Law

Hawaii's new CD legislation was the result of construction industry dissatisfaction with the Hawaii Court of Appeals's 2010 decision in *Group Builders, Inc. v. Admiral Ins. Co.*, 231 P.3d 67 (Hawaii 2010). In *Group Builders*, the Hawaii court held that "under Hawaii law, construction defect claims
do not constitute an 'occurrence' under a CGL policy. Accordingly, breach of contact claims based on allegations of shoddy performance are not covered under CGL policies. Additionally, tort-based claims, derivative of these breach of contract claims, are also not covered under CGL policies." *Id.* at 73-74.

While the *Group Builders* court did not address the issue in these terms, it appears that the decision precluded coverage for not only defects in a contractor's own work, but also any consequential damages caused by the contractor's faulty workmanship. Consider

that the claim at issue involved the availability of coverage for an insured that installed, among other things, an EIFS system on a hotel, which then experienced mold growth in guest rooms, followed by the closure of 20 floors of rooms.

The Hawaii legislation takes direct aim at *Group Builders* – declaring in its Legislative Findings that the decision "creates uncertainty in the construction industry, and invalidates insurance coverage that was understood to exist and that was already paid for by construction professionals. Prior to the *Group Builders* decision, which held that commercial general liability policies do not cover bodily injury or property damage arising from construction defects, construction professionals entered into and paid for insurance contracts under the reasonable, good-faith understanding that bodily injury and property damage resulting from construction defects would be covered under the insurance policy. It was on that premise that general liability insurance was purchased." The crux of the Legislative Findings is that "[t]he reach of the construction industry in Hawaii's economy is broad and deep; any disruption to the industry has far-reaching consequences for the State's total economy."

Following the legislature's several pages of Findings, that paint the *Group Builders* decision in very problematic terms for the state's economy, it announces that, in a policy issued to a construction professional, for liability arising from construction-related work, the meaning of the term "occurrence" "shall be construed in accordance with the law as it existed at the time that the insurance policy was issued."

In an interesting approach to the construction defect insurance debate, the Hawaii legislature has now defined "occurrence" by resort to case law – pre- and post-*Group Builders*. Insureds will no doubt argue that, based on the Legislative Findings, policies that were issued prior to the May 19, 2010 decision in *Group Builders* afford coverage for construction defects. In fact, however, the legislation leaves open for determination the extent of coverage available in Hawaii for CD claims prior to *Group Builders.* Policies that were issued after the decision in *Group Builders* will be subject to its holding that construction defect claims – contract and tort -- do not constitute an "occurrence" under a CGL policy.

This two-part approach seems to have been motivated by the legislature's main concern – the elimination of coverage for existing construction projects. The Legislature's Findings noted: "The *Group Builders* decision affects insurance policies for construction projects that may already be in progress or even completed and for which construction defects and any resulting damages may have not yet become manifest." "The purpose of this Act is to restore the insurance coverage that construction industry professionals paid for and to ensure that the good-faith expectations of parties at the time they entered into the insurance contract are upheld."

A copy of the new Hawaii CD law can be accessed here:

http://www.capitol.hawaii.gov/session2011/bills/HB924_SD2_.pdf

The Mess That is CD Coverage Nationally

Hawaii is now at least the 4th state in the past year to attempt to address the availability of coverage for construction defects via statute. While the legislatures were driven to take action following dissatisfaction with their states' judicial pronouncements, they have not been any more consistent in their solutions than courts. Take a look…

Colorado (Statute - May 2010): "[A] court shall presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured." However, nothing in the Act "[r]equires coverage for damage to an insured's own work unless otherwise provided in the insurance policy; or [c]reates insurance coverage that is not included in the insurance policy." In essence, the "your work" exclusion is not affected by the statute.

Arkansas (Statute – March 2011): A CGL policy shall contain a definition of "occurrence" that includes "[p]roperty damage or bodily injury resulting from faulty workmanship." The statute places no restriction on exclusions in the policy.

South Carolina (Statute – May 2011): A CGL policy shall contain or be deemed to contain a definition of "occurrence" that includes "[p]roperty damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself." The statute places no restriction on exclusions in the policy.

Hawaii (Statute – June 2011): Defining "occurrence" by comparing the time of the issuance of the policy to the Hawaii Court of Appeals's May 19, 2010 decision in *Group Builders* v. Admiral Ins. Co.

In essence, all four of these states have passed laws that come at the "occurrence" issue in a different manner. In Colorado, damage to the insured's work itself is an occurrence. In South Carolina, damage to the insured's work itself is not an occurrence. The Arkansas statute does not specifically speak in terms of damage to the insured's work itself. In Hawaii, it depends when the policy was issued.

Of course, judicial decisions addressing the availability and extent of coverage for faulty workmanship are just as diverse. In general, in every state, there is no coverage owed for damage solely to the insured's completed work product. In some states that is because it is not an "occurrence." In other states it is because of the "your work" exclusion. But while the answer is the same, it matters which way you reach this conclusion as it affects the applicability of the very important "sub-contractor exception" to the "your work" exclusion. And notwithstanding the varying rules and rationales concerning coverage for damage to the insured's own work product, "property damage" to something other than the insured's own work product is generally an "occurrence," and covered, unless you are in Pennsylvania, Utah, Wyoming or Hawaii – under a policy issued after *Group Builders*. And there are also some states that address the issues using other rationales.

If you have any questions, please let me know.

Randy J. Maniloff
White and Williams LLP
1800 One Liberty Place | Philadelphia, PA 19103-7395
Direct Dial: 215.864.6311 | Direct Fax: 215.789.7608
maniloffr@whiteandwilliams.com