BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
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For Insurers In Pennsylvania: Courts Continue to Sing The Praises of *Kvaerner* And *Gambone*

Karen Carpenter, on life as an insurer in Pennsylvania handling construction defect claims:

Everything I want the world to be
Is now comin' true especially for me
And the reason is clear, it's because Gambone is here
It's the nearest thing to heaven that I've seen.

Karen Carpenter, on life as a policyholder in Pennsylvania seeking coverage for a construction defect claim:

Talkin' to myself and feelin' old
Sometimes I'd like to quit
Nothing ever seems to fit
Hangin' around
Nothing to do but frown
Rainy Days and Gambone always get me down.

[OK, so I own a couple of Carpenters CDs. And what's so terrible about that. Besides, I'll just deny I said it.]

For policyholders seeking coverage in Pennsylvania for construction defects, the past few years have been a continuous and repeated exposure to the same general harmful conditions – losing. This trend continued this week when the Eastern District of Pennsylvania decided *Bomgardner Concrete v. State Farm*.

If *Bomgardner Concrete* simply involved an insured-contractor, precluded from coverage for its construction work that went south, with no other unusual factors, I probably would have deemed the decision not *Binding Authority* material. After all, such cases have become relatively routine and each new one generates less interest. But *Bomgardner Concrete* has a twist to the usual fact pattern of a *Kvaerner/Gambone* decision.

Bomgardner Concrete was an insured-concrete installer that installed a concrete floor at a residence. A claim was made against the company for spalling and delamination of the concrete. The court discussed *Kvaerner*, *Gambone* and *CPB International* and concluded that no coverage was owed because the claim "[did] not arise out of an 'occurrence.'" *Id.* at 11.

So far it sounds like a run of the mill Pennsylvania construction defect decision of late. And, besides, even if any "property damage" had been caused by an "occurrence," surely coverage would have nonetheless been precluded by the "your work" exclusion. Even the staunchest policyholder counsel, arguing in favor of faulty workmanship constituting an "occurrence," would be hard pressed to deny the applicability of the "your work" exclusion to those facts.

But *Bomgardner Concrete* has a twist. The defective concrete was caused by the concrete itself -- excess water and inadequate curing. The defect was not caused by the concrete installation. And, most significantly, Bomgardner Concrete, the insured-concrete installer, obtained the concrete from another party [Pennsy]. Thus, the insured argued that the claim was not for "faulty workmanship."

The court rejected this argument:

Although Bomgardner asserts that his claim is not one for faulty workmanship because the blame lay with Pennsy, this argument is unavailing. Assuming, as we must, that the fault was entirely Pennsy's, the underlying claim is nonetheless one based on improper workmanship. That Pennsy was responsible for the defective concrete does not convert the claim into one based on an "accident." Indeed, the court in *Kvaerner* rejected the insured's argument that its faulty workmanship claim was covered under the insurance policy, even though the insured alleged that its subcontractor was actually to blame for the defective work product. *Kvaerner*, 908 A.2d at 893. Likewise, in *Millers Capital Insurance Co. v. Gambone Brothers Development Co.*, 941 A.2d 706, 715 (Pa. Super. Ct. 2007), in which the Superior Court applied *Kvaerner*, the court stated that claims based on faulty workmanship, whether the fault of the insured or a subcontractor, "cannot be considered 'occurrences'... as a matter of plain language and judicial construction."

Id. at 10.

The significance of *Bomgardner Concrete* is this. The Pennsylvania Supreme Court held in *Kvaerner* that, even if the insured did not intend for the damage to occur (which the *Kvaerner* court noted is almost always the case), faulty workmanship does not constitute an occurrence. In *Bomgardner Concrete*, the insured, having bought the at-fault product from another party, no doubt felt that it had a stronger argument that it did not intend for the damage to occur. But despite this, the court still concluded that the property damage was not caused by an "occurrence."

If the *Bomgardner Concrete* court had concluded that any "property damage" was caused by an "occurrence," then the discussion would have no doubt turned to the "your work"

exclusion and its "subcontractor exception." But the court noted that, by finding no "occurrence," it was not necessary to reach the exclusions.

A copy of the Eastern District of Pennsylvania's September 14th decision in *Bomgardner Concrete v. State Farm* can be accessed here.

http://www.paed.uscourts.gov/documents/opinions/10D0971P.pdf

Please let me know if you have any questions.

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