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The "No Occurrence" Concurrence: 5th Circuit Applies the Faulty Workmanship Rule to Products

Believe me. I was as surprised as anyone when I heard that one of the Chilean miners came up after spending 70 days a half a mile underground and just as they opened the door to the rescue capsule his first words were – "What did I miss in *Binding Authority*?"

One thing that surely didn't change during the wonderfully feel-good Chilean mining drama was the popularity of insurers raising "no occurrence" as a defense to faulty workmanship claims. Between my own clients, what I see in the never-ending case law, hear from *Binding Authority* subscribers and general scuttlebutt in coverage circles, construction defect coverage disputes know no bounds and the "no occurrence" debate continues to be at the center of it all.

For the most part, cases addressing whether faulty workmanship is an "occurrence" have become too humdrum to be a subject for *Binding Authority* – barring something unusual. On Friday the Fifth Circuit Court of Appeals issued a "no occurrence" decision. On one hand, standing alone, the decision was not particularly significant. On the other hand, because "no occurrence" is getting so much attention in the construction defect world, and because Friday's decision arose outside of the faulty workmanship context (where most of that attention lies) the editorial board of *Binding Authority* voted to address it.

Advanced Environmental Recycling Technologies v. American International Specialty Lines Ins. Co. involved a claim by Advanced Environmental ("AERT"), a manufacturer of recycled wood composite building products, including decking and other exterior products. AERT was named as a defendant in suits by its customers seeking damages based on allegations that AERT's ChoiceDek products were vulnerable to mold, mildew, and fungal growth. The claims were based upon allegations that AERT's products were defectively designed and manufactured, not suitable for their intended use, and not suitable for use as they were warranted and represented. The court noted that, "[s]ignificantly, the only damage alleged in the Mold Lawsuits is to the AERT products themselves and not to any additional property or to people." *Id.* at 1-2.

AERT sought coverage from AISLIC under Commercial General Liability and Umbrella Liability policies. AISLIC asserted that no coverage was owed because, among other reasons, the Mold Lawsuits did not allege an "occurrence."

The *AERT* Court, addressing Arkansas law, turned for guidance to the Arkansas Supreme Court's decision in *Essex Ins. Co. v. Holder*, 261 S.W.3d 456, 458 (Ark. 2007). *Essex* involved a suit brought against a home builder for breach of contract, breach of an express warranty, breach of implied warranties and negligence. "The [*Essex*] court concluded unequivocally that '[f]aulty workmanship is not an accident.'" *Id.* at 6 (quoting *Essex* at 460].

AERT sought to distinguish *Essex* because it involved workmanship rather than product manufacturing. However, the *AERT* court was not convinced [at least not in the absence of addressing the issue on a blank slate, the court noted]:

[AERT] does not explain why that distinction makes a difference. *Essex* stands for the proposition that shoddy work (whether in manufacturing a product or working at a construction site) which then fails without collateral damage to a person or other property is not an 'accident' from the standpoint of the insured. In this case, the only damages AERT's customers alleged were to AERT's products. We hold that the events alleged in the Mold Lawsuits were not 'accidents' under the Umbrella Policies. We conclude that the Mold Lawsuits do not allege an 'occurrence' and therefore hold that AISLIC did not have a duty to defend the Mold Lawsuits. *Id.*

Having determined that the Mold Lawsuits did not allege an "occurrence," the *AERT* Court deemed it unnecessary to address any applicable exclusions.

Again, standing alone, *AERT* is not a particularly significant decision. After all, even if the court had concluded that the Mold Lawsuits did allege an "occurrence," surely the policies' "your product" exclusion would have precluded coverage (unless there was something peculiar here). And since the "your product" exclusion does not have an exception, the road taken to arrive at the no coverage destination ("no occurrence" or "yes occurrence, but an exclusion applies") does not have the same significance as it does in claims involving the "your work" exclusion (which, of course, has a sub-contractor exception). But since the occurrence issue is getting so much attention, and since *AERT* addressed the issue in a less frequently seen context than faulty workmanship, it seemed worthy of a brief mention.

A copy of the 5th Circuit's October 22 decision in *Advanced Environmental Recycling Technologies v. American International Specialty Lines Ins. Co.* can be accessed here.

http://www.ca5.uscourts.gov/opinions/unpub/09/09-11075.0.wpd.pdf

Please let me know if you have any questions.

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