

Illinois Appellate Court Clarifies What Is and Is Not an “Occurrence” in the Construction Defect Context

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Insurance Coverage and Bad Faith Alert

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On December 31, 2019, the First District Illinois Appellate Court issued its decision in *Owners Insurance Company v. Precision Painting & Decorating Corporation*, clarifying what does and does not constitute “property damage” caused by an “occurrence” in the construction defect context. 2019 IL App. (1st) 190926-U, 2019 Ill. App. Unpub. Lexis 2425.

The underlying case involved allegations of negligence, consumer fraud and breach of contract. In particular, the underlying homeowner claimants alleged that Precision Painting & Decorating Corporation (Precision), whom the homeowners had hired to perform certain **exterior** paintwork at their home, failed to conform to U.S. Environmental Protection Agency (EPA) regulations with respect to the presence of lead-based paint. In its contract, Precision had agreed to take special care with respect to containing lead dust while working on the homeowners’ property. Despite having agreed to do so, Precision (allegedly) took almost no precautions, resulting in significant contamination to the **interior** of the home.

Owners Insurance Company (Owners) had issued Precision a CGL policy, providing coverage for “property damage” caused by an “occurrence,” defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

Precision tendered its defense to Owners. Owners filed a DJ Action arguing that it owed no duty to defend as the homeowners had failed to allege any “property damage” caused by an “occurrence.” Specifically, Owners argued that, under Illinois law, damages resulting from an insured’s breach of contract are not recoverable under a CGL policy.

The trial court agreed, finding that no “accident” or “occurrence” was alleged. The trial court observed that the homeowners’ contract with Precision had specifically provided for various EPA-required precautions with respect to the use of lead-based paint. The trial court concluded that Precision’s failure to implement those precautions was not an “accident,” which in the trial court’s view, referred to something “unforeseen or untoward or disastrous.” Instead, the trial court characterized Precision’s conduct as nothing more than a foreseeable breach of contract.

Precision appealed, and the Appellate Court reversed and remanded. The Appellate Court found that the trial court’s focus on foreseeability was misplaced. It observed that: “[i]nstead of focusing on the foreseeability of the event itself (the release of lead-based particles), or even generally the damages (lead contamination),” Illinois case law instructs courts “to **focus on what, specifically, was damaged, and whether the remediation of that damage fits within the general purpose of a CGL policy.**” *Id.* at *12 (emphasis added). The Appellate Court emphasized that: “when the underlying lawsuit against the insured contractor alleges damages *beyond* repair and replacement, and *beyond* damage to other parts of the same project over which that contractor was responsible, those additional damages are deemed to be the result of an ‘accident.’” *Id.* at *14.

The Appellate Court was careful to contrast these so-called “beyond” damages with damages arising out of faulty workmanship, alone. It reiterated that it is well-settled under Illinois law that “there is no occurrence when a [contractor’s] defective workmanship necessitates removing and repairing work.” *Id.* at *14. This is true even when a contractor’s faulty workmanship results in consequential damages to any other part of the project for which the contractor has responsibility, as it remains part of the contractor’s work product. However, where damages extend beyond the scope of a contractor’s work product, the court concluded that those damages are more

properly classified as unforeseeable accidents, and thus "occurrences."

The Appellate Court found that Precision's "work product" was limited to the exterior of plaintiffs' house. Thus, any damage to the interior of the home, as well as to the surrounding land, was outside the scope of Precision's project. Because plaintiffs had alleged damages "*beyond* repair and replacement, and *beyond* damage to other parts of the same project over which [Precision] was responsible," plaintiffs had satisfactorily alleged "property damage" caused by an "occurrence." The Appellate Court reversed and remanded in accordance with those findings.

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