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# Insurers To Seize On Gaps In Ga. Construction Defect Ruling

By **Bibeka Shrestha**

*Law360, New York (July 15, 2013, 7:56 PM ET)* -- While the Georgia Supreme Court on Friday issued a pro-policyholder ruling that standard policies can insure damage to a contractor's work, the decision leaves an opening for insurers to escape coverage by arguing that the required type of property damage hasn't occurred.

The ruling lets homebuilder Taylor Morrison Services Inc. pursue coverage with HDI-Gerling America Insurance Co. for a class action brought on behalf of more than 400 homeowners claiming the concrete foundations of their homes were improperly constructed.

Answering questions sent to it from the Eleventh Circuit, the high court clarified a 2011 decision that found faulty workmanship that unexpectedly damages surrounding properties counts as an "occurrence," or accident, that is covered by insurance policies. It concluded that that was not the only kind of faulty work that constitutes an occurrence, finding standard commercial general liability also covers damage to the policyholder's completed work.

Scott Turner, an Anderson Kill & Olick PC attorney who focuses on construction-related coverage disputes, told Law360 the decision would have a huge effect in Georgia, where these major coverage issues were still up in the air.

"We're in the middle of an accelerating tipping effect, with more and more courts adopting the pro-coverage position on 'occurrence' in regard to faulty work," Turner said. "Nationally, it adds a significant jurisdiction to and further accelerates this tipping phenomenon."

The Georgia Supreme Court also held that CGL policies can insure an unintentional breach of warranty by a policyholder, but not fraud, while declining to answer whether a breach of contract can count as an occurrence.

In the face of this win for policyholders, experts say that insurers will jump on parts of the decision that say coverage for construction defects can still be limited by the other requirements for coverage, if not by policy exclusions.

Laura Foggan, a partner at Wiley Rein LLP who filed an amicus brief in the case, said it was important that the decision recognized that the term "property damage" imposed limits on the scope of coverage. The Georgia high court said in its ruling that the standard CGL policy requires "property damage," a term that "necessarily must refer to property that is nondefective, and to damage beyond mere faulty workmanship."

"Answering a question about the scope of 'occurrence' doesn't totally resolve the question of whether coverage is available for construction defects," Foggan said. "You have to go through the policy as a whole. And there are other complementary provisions, such as the definition of 'property damage.'"

According to Turner, insurers will focus on that part of the decision as they craft their arguments against coverage.

"Insurance companies will likely emphasize their argument that defective work can never satisfy the 'property damage' requirement," Turner said.

Foggan and Turner said they expected insurers and policyholders to continue a heated, state-by-state battle over whether faulty workmanship is covered by policies, even as a spate of pro-coverage decisions has been handed down in recent months.

Earlier this year, supreme courts in North Dakota and West Virginia reversed course and found coverage for defective construction under CGL policies in spite of earlier precedents establishing the opposite.

But Foggan said the law remained mixed throughout the U.S. and that many of these cases depend on the facts. The Georgia Supreme Court decision, for instance, leaves room for insurers to argue that a breach of contract claim does not count as an occurrence, she said.

"Although policyholders may be happy with some of the more recent rulings, it only takes one court to rule otherwise, and suddenly the trend has changed," Foggan said.

The Georgia high court has not answered for now whether a breach of contract can constitute an occurrence, noting that the underlying class action in the Taylor Morrison case included no such claim.

The issue is not a headache for real estate developers, which usually face breach of warranty claims, according to Turner. But contractors and subcontractors will still be on the edge of their seats to see how that dispute plays out, since almost all their work is performed under contract and they usually are hit with breach of contract claims, Turner said.

In the meantime, insurers aren't likely to make changes to their policies to respond to unfavorable occurrence decisions like the one handed down in Georgia, according to Randy Maniloff, a White & Williams LLP attorney and author of the insurance law newsletter Coverage Opinions.

"The effort has been on excluding property damage that took place prior to the policy period and the use of endorsements that penalize insureds for not exercising appropriate risk management when it comes to their use of subcontractors," Maniloff said.

Attorneys for Taylor Morrison and HDI-Gerling were not immediately available to comment on Monday.

Taylor Morrison is represented by Caroline Spangenberg, Julie Lierly and Ellen McCarley of Kilpatrick Townshend & Stockton LLP.

HDI-Gerling is represented by Michael Bruyere of Freeman Mathis & Gary LLP and Ann Kirk of Fields Howell Athans & McLaughlin LLP.

The case is Taylor Morrison Services Inc. v. HDI-Gerling America Insurance Co., case number S13Q0462, in the Supreme Court of Georgia.

--Editing by Elizabeth Bowen and Chris Yates.

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