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S.C. Supreme Court Rules on Statute Requiring CGL Policies to Contain a Specific Definition of "Occurrence"

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S.C. Statute Requiring CGL Policies to Contain a Specific Definition of "Occurrence" Held Constitutional; Retroactive Application of Statute Held Unconstitutional

In a recent decision, Harleysville Mutual Insurance Co. v. South Carolina, (Opinion 27189, Nov. 21, 2012), the South Carolina Supreme Court held S.C. Code § 38-61-70, which addresses the definition of "occurrence" in commercial general liability policies, was constitutional; however, the retroactive application of the statute was not.

§ 38-61-70, effective May 17, 2011, provides that commercial general liability policies insuring construction professionals for liability arising from construction related work shall contain, or be deemed to contain, a definition of "occurrence" that includes (1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions and (2) property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself. The section, as written, applies to any pending or future dispute over coverage that would otherwise be affected by the section as to all commercial general liability insurance policies issued in the past, currently in existence, or issued in the future.

The law was enacted in response to the South Carolina Supreme Court's January 7, 2011, initial opinion in Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company. In that initial opinion, which never became final, the Court held that insurance issued to Beazer Homes did not provide coverage for claims arising out of damaged condominiums caused by faulty workmanship because "the damaged to the insured's property [was] no more than the natural and probable consequences of faulty workmanship." The opinion indicated there was no fortuity element present and, for faulty workmanship to give rise to potential coverage, the faulty workmanship must result in an occurrence – an unintended, unforeseen fortuitous or injurious event. The initial opinion overruled the Court's decision in Auto Owners Insurance Company, Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009).

On May 23, 2011, less than a week after §38-61-70 became effective, the Supreme Court heard arguments on the petition for rehearing in the Crossmann case, which was granted July 7. On August 22, 2011, the Supreme Court issued a new opinion, which became the final opinion, and found in favor of coverage based on an "occurrence." Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company, 395 S.C. 40, 717, S.E.2d 589 (2011). The Court reaffirmed its decision in Newman and clarified that negligence or defective construction resulting in damage to otherwise non-defective components may constitute property damage, but defective construction would not.

Harleysville filed a direct action against the State under the Supreme Court's original

jurisdiction, challenging the constitutionality of § 38-61-70. In Harleysville Mutual Insurance Co. v. South Carolina, (Opinion 27189, Nov. 21, 2012), the Supreme Court held the statute was constitutional, but that retroactive application of the statute was not. The Court first held that the enactment of the statute did not violate the doctrine of separation of powers. The General Assembly acted and ratified that section in response to the Court's January 2011 opinion. The Supreme Court theorized that if that opinion had been that Court's final opinion, the doctrine might be implicated; however, given that the August Crossmann opinion replaced the January Crossmann opinion, the General Assembly did not retroactively overrule the Court's interpretation of a statute. The Court next concluded the statute did not constitute special legislation or violate equal protection. The Court did hold, however, that the retroactive application of the statute was an unconstitutional violation of the state and federal Contract Clauses. The South Carolina constitution provides:

> "No bill of attainder, ex post facto law, law impairing the obligation of contracts, nor law granting any title of nobility or hereditary emolument, shall be passed, and no conviction shall work corruption of blood or forfeiture of estate."

The Court held that the Act introducing the legislation impaired contractual relationships by mandating all CGL policies be legislatively amended to include a new statutory definition of occurrence and by applying this mandate retroactively, finding the statute fundamentally changes the definition of occurrence.

In Auto Owners v. Newman, the Supreme Court suggested "that a CGL policy may provide coverage where faulty workmanship causes third party bodily injury or damage to other property besides the defective work," leaving open the possibility there may be instances where coverage might not be provided. Newman examined the interaction of the traditional definition of occurrence with the faulty workmanship exclusion in the insurance contract, "Occurrence, as we confirmed in Crossmann II, traditionally means "accident" or "a continuous or repeated exposure to substantially the same general harmful conditions." The Harleysville v. South Carolina Court opined that in §38-61-70 the legislature expanded the traditional definition of occurrence to also mandate the inclusion of faulty workmanship.

The effect of the opinion is likely limited to pre-May 17, 2011, policies which contain a definition of occurrence more limited than the standard CGL policy definition of an accident, including continuous or repeated exposure to substantially the same general harmful conditions. If a policy contains that definition, an interpretation of the policy is subject to that provided by the Court in Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company.

About Pete Dworjanyn

Pete Dworjanyn is a shareholder and chair of Collins & Lacy's Insurance Coverage Practice Group and founding author of the South Carolina Insurance Law Blog. Following law school, Pete served as a law clerk for the Honorable Julius H. Baggett, Eleventh Judicial Circuit and as Assistant Solicitor in the Eleventh Circuit Solicitor's Office. Prior to joining Collins & Lacy in 1999, Pete was in private practice, focusing on civil litigation. Pete's reputation has earned him a BV rating by Martindale-Hubbell. He also is one of the Best Lawyers in America, the oldest and most respected peer-review publication in the legal profession.

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