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At Odds With 'Occurrences' in Pennsylvania Faulty Workmanship Claims, The Legal Intelligencer, author Christopher Tellner, Esq.

Here we are again. When last writing on this topic in 2018, courts within the commonwealth consistently ruled that faulty workmanship and negligent construction do not rise to the level of an "occurrence" in commercial general liabilities (CGL) policies. That is, until faulty workmanship becomes an occurrence by virtue of a fortuitous event—such as flooding—"where the claim is for damage to property not supplied by the insured and unrelated to what the insured contracted to provide." For anyone who has been paying attention, the obvious conclusion is that the Pennsylvania Superior Court took a significant leap from the plank to fashion a ruling where insureds can attempt to commandeer coverage for their faulty work. At some point, the Pennsylvania Supreme Court will need to right the ship that its intermediary appellate court has steered off course. The notion that faulty workmanship is not a covered occurrence under CGL policies was cemented in 2006 by the Pennsylvania Supreme Court in e, 908 A.2d 888 (Pa. 2006), however this is no longer revelatory. For those relatively sane attorneys who do no revel in policy interpretation, then it is worthwhile to provide a brief history of why poor workmanship is not accidental.

Since 2006, Pennsylvania law has provided that there can be no finding of an occurrence under a general liability policy for faulty workmanship of an insured. Quite simply, this is because CGL policies define occurrence to mean an accident, or a fortuitous event not expected from the standpoint of the insured. Clearly, poor workmanship is not accidental; it is just sloppy work. This holds true for all claims of faulty workmanship asserted under claims of breach of contract and breach of warranty. Simply put, Pennsylvania law finds that such claims are not a fortuitous accident, and therefore, are not an occurrence. In cementing this rule of law, the Pennsylvania Supreme Court held that the "definition of 'accident' required to establish an 'occurrence' under the policies cannot be satisfied by claims based upon faulty workmanship." See r. Claims based upon faulty workmanship "simply do not present the degree of fortuity contemplated by the ordinary definition of 'accident' or its common judicial construction in this context." The court asserted property damage to the work product itself arising from poor workmanship does not trigger the defense duty.

However, post-Kvaerner, a trend emerged. Underlying claimants began to assert tort-based claims in an effort to trigger coverage. Namely, claimants began to allege that faulty workmanship of an insured resulted from claims of negligence, negligent misrepresentation, negligent failure to perform professional services, and myriad others. Numerous courts have expanded to find that, simply relabeling causes of action to appear accidental is insufficient to alter what would otherwise be nonaccidental conduct into that of an occurrence. The proclamations of have been extended under Pennsylvania law to preclude coverage for damage to property that was a "natural and foreseeable" result of the faulty workmanship. The "natural and foreseeable" results of faulty workmanship include:

- *Millers Capital Insurance v. Gambone Bros. Development, 941 A.2d 706 (Pa. Super. Ct. 2007) (no duty to defend water damage to other property that resulted from defective stucco installation).*
- *Specialty Surfaces International v. Continental Casualty, 609 F.3d 223 (3d Cir. 2010) (relying on Gambone in holding insurer had no duty to defend manufacturer-seller of synthetic turf against negligence and breach of warranty claims because "faulty workmanship, even when cast as a negligence claim, does not constitute [an 'occurrence']").*
- *Sapa Extrusions v. Liberty Mutual Insurance, 939 F.3d 243 (3d Cir. 2019) (finding no occurrence when the insured manufactured aluminum window profiles failed, and there was no coverage for a suit brought by an installer against the insured manufacturer, rejecting the insured's argument that third-party property damage triggers coverage).*
- *Atain Insurance v. Xcapes, No. 2:19-CV-05346, (E.D. Pa. July 20, 2020) (obtained a ruling of no duty to defend or indemnify insured in underlying lawsuit alleging faulty workmanship and related, foreseeable damages arising from faulty hardscaping that damaged other property that was not worked on).*
- *Atain Insurance v. Basement Waterproofing Specialist, No. 20-5440 (E.D. Pa. Nov. 3, 2021) (finding no duty to defend or indemnify water infiltration claims arising from faulty workmanship, including claims sounding in negligence, and extending "no occurrence" insurance law to damaged property not worked on by insured).*
- *Acuity v. Pools by Snyder, 2021 WL 1907472 (E.D. Pa. 2021) (finding no occurrence for faulty construction of pool, ruling out external forces such as a natural sink hole causing or contributing to the damage).*

- *Evanston Insurance v. Tristar Products, 537 F.Supp.3d 798 (E.D. Pa. 2021) (finding no occurrence for faulty construction of cookware, despite that it damaged property other than what the insured manufactured).*
- *Berkley Specialty Insurance v. Masterforce Construction, Civ. Act. No. 4:19-CV-01162, (M.D. Pa. Jan. 26, 2021) (ruling faulty roof installation was faulty workmanship and did not arise to an occurrence, precluding coverage for both faulty roof installation as well as resultant water damage to interior property that was determined to be a natural and foreseeable consequence of faulty workmanship) (rejecting the reasoning of Pottstown and Indalex, concluding "that the Pennsylvania Supreme Court would determine that damage to third-party property caused by faulty workmanship does not qualify as an accident sufficient to trigger insurance coverage.").*
- *Estate Chimney & Fireplace v. IFG Companies, (E.D. Pa. 2021) (sloppy replacement of chimney covers was not an occurrence when it led to foreseeable damage to the chimney itself and ultimately rendered the fireplace unusable, despite that actual chimney caps were not damaged).*
- *Colabelli v. Evanston Insurance, (E.D. Pa. 2022) (finding no occurrence for water leaking into a home, causing damage, arising from faulty construction, relying on Sapa Extrusions for the proposition, "any distinction between damage to the work product alone versus damage to other property is irrelevant so long as both foreseeably flow from faulty workmanship.")*
- *Main Street America Assurance v. Howard Lynch Plastering, 2022 WL 445768 (E.D. Pa. 2022) (finding no occurrence was alleged for faulty construction of 34 homes, rejecting the insured's Indalex-based argument that damage was caused by the malfunctioning of off-the-shelf products).*

While the forgoing jurisprudence was occurring (pun intended), the Pennsylvania Superior Court cracked the Kvaerner cement foundation in Indalex v. National Union Fire Insurance of Pittsburgh, 83 A.3d 418 (Pa. Super. Ct. 2013) (finding an occurrence when it was alleged that windows and doors manufactured by the insured and installed by a third party in claimants' homes were defectively designed or manufactured, "actively malfunctioned," and allegedly caused damage). The Superior Court found that faulty workmanship, alone, did not contribute to the underlying claims. Rather, there were "issues framed in terms of a bad product … an 'active malfunction,' and not merely bad workmanship." Thus, Indalex truly does not stand for the proposition that faulty workmanship can give rise to an occurrence, but rather, that claims of product liability of an insured can give rise to an occurrence. Since then, many courts have rejected the implication of Indalex. See Masterforce and Howard Lynch.

And then comes Pennsylvania Manufacturers Indemnity v. Pottstown Industrial Complex, 215 A.3d 1010 (Pa. Super. Ct. 2019). There, the Superior Court took a large leap from Indalex and found that an occurrence was alleged when property of an insured's tenant was damaged from a flood. In the underlying complaint, the tenant alleged breach of contract against the insured landlord, claiming the insured breached the rental agreement by failing to properly maintain the property, which resulted in a flooded premises and damage to the tenant's property. Under the cases discussed above, it seems rather straightforward that the damage arose from faulty maintenance. However, the Superior Court relied on Indalex for the proposition that "where the underlying claims allege that the insured's faulty work caused personal injury or an event that damaged other property, this Court has concluded that there was an 'occurrence' and that the insurer had a duty to defend."

Pennsylvania now seems to find itself in a split among federal and state decisions, with decisions like Sapa Extrusions and Masterforce more closely following the tenants of Kvaerner and its progeny, while the Pennsylvania Superior Court continues to steer off the well-chartered path and create coverage where it should not otherwise exist. It is time for the Supreme Court to step in and right the ship. To allow for decisions like Pottstown to stand much longer will upend almost two decades of decisions properly finding that there can be no occurrence arising from faulty workmanship.

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