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Litigation alert

Covered or Not – That is the Question

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March 2014

In the very recently decided case of *Indalex, Inc. v. National Union Fire Insurance Company*, the issue was whether a window manufacturer had insurance coverage for underlying lawsuits, wherein homeowners claimed that the manufacturer's windows and doors were defectively designed or manufactured, and resulted in water leakage that caused physical damage, such as mold and cracked walls, in addition to personal injury. The window manufacturer itself had not been sued directly by the homeowners. The homeowners brought suit against the contractors and subcontractors. The contractors and subcontractors then joined the window manufacturer in the underlying lawsuits. The trial court found that there was no insurance coverage for the window manufacturer. On appeal, however, the Superior Court reversed and found that, in this instance, there was insurance coverage.

At first, this would appear to be a departure from settled case law, which generally holds that there is no coverage for repairs for defective or faulty construction work. Ordinarily, a contractor or subcontractor's insurance policy does not provide coverage for "faulty workmanship" or "defective construction." For example, in the frequently cited case of *Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Co.,* 908 A.2d 888 (Pa. 2006), the Supreme Court determined there was no insurance coverage for a contractor sued based upon allegations of breach of contract and breach of warranty based upon allegations that the construction of a coke oven battery failed to meet construction specifications. The Court found that the underlying complaint alleged merely property damage to the "product itself" due to faulty workmanship. The rationale was that the Court would not convert a policy for insurance into a performance bond. Similarly, in *Millers Insurance Co. v. Gambone Brothers Development Co., Inc.*, 941 A.2d 706 (Pa. Supra. 2007), the Court found that there was no insurance coverage for the general contractor in underlying suits by homeowners against the contractor alleging that homes were built with defective stucco exteriors, windows, and other artificial seals intended to protect the home and interiors from the elements. Once again, citing *Kvaerner*, the Superior Court found that, distilled, the allegations were merely allegations that faulty workmanship caused damage to the "product itself," that is, the home, for which there was no coverage.

Here, in *Indalex*, by contrast, the Court made a critical distinction in that the suits by contractors and subcontractors against the manufacturer were based upon allegations that "an off-the-shelf product failed and allegedly caused property damage and personal injury," and that this was construed as an "active malfunction" and not merely bad workmanship. While the distinction is subtle, it is critical to the holding of the case so that it does not deviate from prior case precedent. Query, whether the result in the *Gambone* case would have been different had there been third-party joinders of window manufacturers by the subcontractors based upon allegations that the off-the-shelf products, windows, failed.

A petition for allowance of appeal has just been filed with the Pennsylvania Supreme Court. Stay tuned as we continue to follow the case.

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