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West Virginia's High Court Holds Defective Workmanship Causing Bodily Injury or Property Damage Does Constitute an "Occurrence" Under Standard CGL Policy

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West Virginia has joined the majority of states recognizing coverage for bodily injury and property damage claims arising out of defective workmanship. Influenced by the growing number of states allowing for such coverage, the Supreme Court of Appeals of West Virginia rejected prior rulings and recently held that defective workmanship causing bodily injury or property damage constitutes an "occurrence" under a policy of commercial general liability ("CGL") insurance. *Cherrington v. Erie Insurance Prop. & Cas. Co.*, Case No. 12-0036, 2013 WL 3156003 (W.Va. June 18, 2013) ("*Cherrington*"). In so holding, the *Cherrington* Court expressly overruled three of its prior decisions, decided between 1999 and 2005, holding that CGL policies do not cover defective workmanship claims.

In *Cherrington*, Lisbeth Cherrington ("Cherrington") entered into a contract with The Pinnacle Group, Inc. ("Pinnacle"), for the construction of a home in Greenbrier, West Virginia. During the period of the home's contract negotiation and construction, Pinnacle had in effect a CGL insurance policy issued by Erie Insurance Property and Casualty Company ("Erie"). Pinnacle's CGL policy provided coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies," so long as the "bodily injury" or "property damage" was "caused by an 'occurrence.'" The policy defined "occurrence," as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Noticeably absent from the policy's definitional section, however, was the term "accident."

After the house was completed, Cherrington alleged various defects in it, including an uneven concrete floor on the ground level of the house; water infiltration through the roof and chimney joint; a sagging support beam; and numerous cracks in the drywall and partitions throughout the house. She sued Pinnacle alleging that "Pinnacle was negligent in the construction of said home…." Pinnacle asserted that, "other than some of the trim work and siding work," all of the work about which Cherrington complained was performed by subcontractors. Erie denied coverage to Pinnacle, and Pinnacle filed a third-party complaint seeking a declaration of coverage. Erie won summary judgment that Cherrington had not established that an "occurrence" or "accident" had caused the damages she allegedly sustained because faulty workmanship, in and of itself, or absent a separate event, is not sufficient to give rise to an "occurrence." Pinnacle appealed.

The Supreme Court of Appeals, however, reversed the lower court's decision, holding that defective workmanship does, in fact, give rise to an occurrence under a CGL policy. At the outset of its opinion, the Supreme Court recounted its earlier decisions concluding that CGL policies do not cover faulty workmanship, but explained that while it "appreciate[s its] duty to follow prior precedents, [it is] also…cognizant that *stare decisis* does not require this Court's continued allegiance to cases whose

decisions were based upon reasoning which has become outdated or fallen into disfavor." The Court explicitly recognized "that a definite trend in the law has emerged since we rendered our [prior decisions] sufficient to warrant this Court's reconsideration of the issues decided therein…." This "definite trend" is the majority view that defective workmanship may be an occurrence under a CGL policy.

Ultimately, the Court relied upon two lines of reasoning to support its conclusion that defective workmanship constitutes an "occurrence" under a CGL policy. First, the Court pointed to the fact that Erie did not define the term "accident," which is used in the policy's definition of "occurrence." The Court found that pursuant to West Virginia law, circumstances giving rise to claimed damages or injuries must not have been "deliberate, intentional, expected, desired, or foreseen" by the policyholder to be accidental. *Columbia Casualty Co. v. Westfield Insurance Co.*, 217 W. Va. 250, 617 S.E.2d 797 (2005). The Court determined the alleged damages were unintended, stating that "[i]t goes without saying that the damages incurred by Ms. Cherrington during the construction and completion of her home, or the actions giving rise thereto, were not within the contemplation of Pinnacle when it hired the subcontractors alleged to have performed most of the work…. Nor can it be said that Pinnacle deliberately intended or even desired the deleterious consequences that were occasioned by its subcontractors' substandard craftsmanship." For these reasons, the Court did not find that the alleged damages incurred by Ms. Cherrington were "deliberate, intentional, expected, desired or foreseen" by Pinnacle.

Second, the Court held that excluding the defective workmanship from coverage in this case would be incongruous with the policy's express language providing coverage for the acts of subcontractors. The Court explained that the CGL's policy Exclusion L specifically excepts coverage for work performed by subcontractors by the "your work" exclusion. According to the Court, "[a]pplication of our prior holdings to find that the defective work of subcontractors does not constitute an "occurrence" and thus is not covered by the subject CGL policy would, indeed, create an absurd result when the policy expressly provides coverage for damages occasioned by subcontractors acting on behalf of the insured."

Finally, the Court noted that the defective workmanship must result in "bodily injury" or "property damage" in order to satisfy the remainder of the policy's insuring clause. The Court then focused its analysis on whether Cherrington had sustained any "property damage," which was defined in the policy as either "[p]hysical injury to tangible property, including all resulting loss of use of that property," or "[l]oss of use of tangible property that is not physically injured." According to the Court, the extensive list of damaged items in Cherrington's home resulting from the allegedly defective construction satisfied either definition.

Cherrington, which liberates policyholders from fifteen years of adverse precedent, eliminates uncertainty as to whether and when coverage exists under West Virginia law for property damage caused by defective workmanship under standard-type CGL insurance policies. Although application in any particular case may be fact-sensitive, and various exclusions contained in a CGL policy may nonetheless bar coverage, West Virginia's high court no longer sides with the minority of states holding that defective workmanship is not an "occurrence" under CGL policies. Policyholders facing construction-related claims under policies governed by West Virginia law should understand these rules to assess how to maximize their insurance recovery.

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