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THE TENTH CIRCUIT HOLDS THAT FAULTY WORKMANSHIP IS NOT A COVERED EVENT AND DOES NOT CONSTITUTE PROPERTY DAMAGE UNDER COLORADO LAW

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On February 26, 2007, the Tenth Circuit Court of Appeals affirmed the United States District Court for the District of Colorado's grant of summary judgment in favor of an insurer on the ground that poor workmanship by subcontractors, standing alone, was not a covered event that constituted property damage under the contractor's CGL policy. *Adair Group, Inc. v. St. Paul Fire and Marine Ins. Co.*, 2007 WL 575983 (10th Cir. February 26, 2007).

In *Adair Group*, the insured sought indemnity from St. Paul for a \$2.5 million arbitration award for construction deficiencies in work performed by the insured's subcontractors. While the arbitration award was based upon the insured's failure, as general contractor, to fully comply with the contract specifications, and not resultant damage flowing from those failures, the insured argued that it was entitled to indemnity because the arbitration panel concluded that the insured was not guilty of a "substantial breach" of the construction contract.

Relying upon Colorado law that "poor workmanship constituting a breach of contract" is not a covered occurrence, the Court recognized that CGL policies normally exclude coverage where resultant damage does not flow from faulty workmanship because such construction deficiencies are considered business risks rather than a "fortuitous event." *Adair Group, Inc.*, 2007 WL 575983*2 (quoting *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196, 1202 (Colo. App. 2003)). The Court explicitly rejected the insured's claim that its use of subcontractors required a different result, reasoning that a general contractor "should not be able to turn its failure to complete construction according to the contract into a covered event" simply because of the subcontractor's negligence. *Id.* (citations omitted). In the other words, the Court accepted the long-held principle that a CGL policy is not intended to act as a performance bond for a subcontractor's failure to follow contract specifications.



Because no resultant damages were alleged to have flowed from the poor and incomplete workmanship of the insured's subcontractors, the Tenth Circuit concluded that such faulty work in itself was not an event triggering the insurance policy at issue. In so holding, the Court did not address the District Court's reliance on the impaired property exclusion as an additional ground for excluding coverage.

The *Adair Group* decision reinforces Colorado law that construction defects, standing alone, are not sufficient to trigger coverage where no resultant damage exists. We believe the federal judiciary in Colorado will continue to reject attempts to transform CGL policies into performance bonds even where an insured seeks indemnity for a subcontractor's negligence that simply results in a breach of particular contract specifications.

For a further analysis of the Adair Group decision and its impact on construction industry insurers, please contact Joe Bermudez, Chris Clemenson or Jason Melichar of Cozen O'Connor's Denver, Colorado office. Cozen O'Connor is a nationally recognized leader in representing the insurance industry in all coverage areas, including construction defect claims.