

## COMMERCIAL GENERAL LIABILITY: HAWAII STATE COURT HOLDS THAT CONSTRUCTION DEFECT CLAIMS DO NOT CONSTITUTE AN "OCCURRENCE"

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**A**s predicted by the U.S. District Court in Hawai'i and the U.S. Court of Appeals for the Ninth Circuit Court in several cases decided in the past 15 years, the Intermediate Court of Appeals of Hawai'i recently held that construction defect claims do not constitute an "occurrence" under a commercial general liability ("CGL") policy. *Group Builders Inc. and Tradewind Ins. Co., Ltd. v. Admiral Ins. Co.*, 2010 Haw.App. LEXIS 234 (May 19, 2010). In so holding, the court specifically concluded that neither breach of contract claims based on allegations of shoddy performance, nor tort-based claims derivative of such breach of contract claims, are covered under CGL policies.

In 1999, Group Builders was subcontracted to install an exterior insulation finishing system and sealant, fireproofing, building insulation and metal wall framing at a new tower in the Hilton Hawaiian Village in Waikiki, Hawai'i. Admiral Insurance issued a CGL policy to Group Builders for a two month period in 2000, while Group Builders was performing the work on the hotel. After construction was completed in mid-2001, the tower guest rooms were opened to the public. One year later, extensive mold growth was discovered and the guest rooms were closed for remediation. A subsequent investigation revealed "numerous material defects in the design and construction" of the tower.

In 2003, Hilton Hotels filed suit against numerous defendants including Group Builders for the construction defects and closure of the tower. The complaint asserted five causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) negligence; (4) breach of express and implied warranties; and (5) negligent misrepresentation. Admiral declined to defend or indemnify Group Builders.

The construction defect suit settled and coverage litigation was filed against Admiral Insurance. The trial court granted Admiral's motion for summary judgment, ruling that Admiral had no duty to indemnify Group Builders because there was no occurrence causing property damage at the tower during Admiral's policy period. On appeal, the Intermediate Court of Appeals of Hawai'i described the issue before it as "whether alleged faulty construction work, giving rise to contractual claims, constitutes an 'occurrence' under a CGL policy." Slip Op. at pg. 10.

The insured relied on precedent from outside Hawai'i holding that construction defect claims are covered claims under CGL policies. However, the court rejected that minority approach, and instead held that claims of poor workmanship are not "occurrences" that trigger coverage under CGL policies. In so holding, the state court agreed with prior federal court decisions applying Hawai'i law, including *WDC Venture v. Hartford Accident & Indemnity Co.*, 938 F.Supp. 671 (D. Hawai'i 1996) (underlying lawsuit was outside the scope of policy coverage where it sought recovery for tort and contract claims that arose from a contractual relationship), *Burlington Ins. Co. v. Oceanic Design & Construction, Inc.*, 383 F.3d 940 (9th Cir. 2004) (relying on Hawai'i Supreme Court authority holding that an underlying complaint alleging an intentional breach of contract does not allege an "occurrence" to hold that tort claims for negligent construction ancillary to a breach of contract claim did not constitute an "occurrence"), and *Burlington Ins. Co. v. United Coating Mfg. Co.*, 518 F.Supp.2d 1241 (D. Hawai'i 2007) (contract and contract-based tort claims are not within the scope of CGL policies).

*The Group Builders* court's holding provides clear guidance on Hawai'i law in the much-litigated field of CGL coverage for construction defect claims:

We hold that under Hawai'i law, construction defect claims do not constitute an "occurrence" under a CGL policy. Accordingly, breach of contract claims based on allegations of shoddy performance are not covered under CGL policies. Additionally, tort-based claims, derivative of these breach of contract claims, are also not covered under CGL policies.

*Group Builders*, Slip Op. at 20.

By stating a clear holding, the court has provided additional assurance for insurers, and clarity for policyholders, regarding the potential of coverage for construction defect claims under Hawai'i law.

*To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Bill Knowles (wknowles@cozen.com, 206.224.1289) or Megan K. Kirk (mkirk@cozen.com, 206.373.7242).*