Faulty Workmanship, Excess Coverage Update

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New York, Arizona Insurance Coverage Update
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Faulty Workmanship – Tenth Circuit (New York Law)

Black & Veatch Corp. v. Aspen Ins. (Uk) Ltd.
--- F.3d ---, 2018 WL 843284 (10th Cir. Feb. 13, 2018)

The U.S. Court of Appeals for the Tenth Circuit overturned the trial court's judgment in favor of Aspen Insurance Ltd. and Lloyd's Syndicate 2003 (Aspen) and agreed with Black & Veatch Corp. (B&V) that the company's umbrella policy with Aspen applies to claims alleging damage to American Electric Power Service Corp.'s (AEP) power plant reactors, stemming from faulty work by B&V's component subcontractor and other lower-tier subcontractors. The appellate court's analysis focused on predicting whether New York's highest court would determine that the Aspen policy's insuring agreement covers the damage to AEP's property from the subcontractors' purported faulty work. Aspen provided B&V with umbrella coverage and the policy contained a "your work" exclusion precluding coverage for damage to B&V's own completed work, but there was an exception to that exclusion for damage to B&V's finished work arising from a subcontractor's faulty construction. The appellate court noted that the damages in this case were accidental and resulted in harm to a third-party's property, thus meeting the policy's definition of an "occurrence." Despite having not yet definitively ruled on how identical or similar policy language should be construed, the appellate court predicted that the New York Court of Appeals would likely follow a "clear trend" among state supreme courts since 2012, holding that "construction defects can constitute occurrences and contractors have coverage under CGL policies at least for the unexpected damage caused by defective workmanship done by subcontractors." The appellate court held that a ruling to the contrary would render the subcontractor exception and several other policy provisions meaningless, which would violate core New York contract interpretation principles.

Excess Coverage – Arizona

Certain Underwrites at Lloyds London v. Republic Servs. Inc.
CV 2017-005489 (Maricopa Cty. Super. Ct. Jan. 30, 2018)

A Maricopa County Superior Court judge ruled that an excess insurer did not yet have an obligation to pay for the pollution liability of its insureds because the primary insurance policy had not been

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exhausted. The insureds had a $25 million excess policy with Certain Underwriters at Lloyds London (Underwriters), and a separate $25 million primary policy. The excess policy required Underwriters to "'pay on behalf of the Insured excess of the Underlying Policies any claim or loss which triggers coverage under the Underlying Policies, and is not otherwise excluded. ...'" The insureds filed a counterclaim for breach of contract against Underwriters, who responded with a motion to dismiss as the primary insurer had yet to pay its $25 million limit. For the purposes of the motion, the trial court assumed the insureds incurred covered losses, the losses exceed the primary $25 million layer and the primary insurer had yet to pay its limits. The court ultimately held that, under either Arizona or New York law, the most reasonable interpretation of the excess policy is that payment is the key event such that the primary insurer had to first pay its $25 million limit before the excess insurer must pay its $25 million limit. Accordingly, the trial court held that because the excess insurer's "duty to pay has not yet arisen ... the breach of contract claim fails to state a claim."

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