

**January 6, 2012**

**Stalker, Vogrin, Bracken & Frimet Obtains Summary Judgment for Insurers  
on Faulty Workmanship and Bad Faith Claim Handling Allegations.**

By:  
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On January 6, 2012, the United States District Court for the Middle District of Pennsylvania granted two (2) Motions for Summary Judgment filed by Tim Stalker and Matthew Brasch for the Defendants, Ohio Casualty Insurance Company (“OCIC”) and American Fire & Casualty Company (“AFCC”) in *L.R. Costanzo Co., Inc. v. Am. Fire & Cas. Ins. Co., et al.*, 2012 U.S. Dist. LEXIS 1655 (Jan. 6, 2012).

This case involves an insurance coverage dispute between Plaintiff, L.R. Costanzo Company, Inc., and Defendants, OCIC and AFCC. The Plaintiff, a construction company, served as the general contractor for a building erected in Tobyhanna Township, Pennsylvania for the Pocono Mountain Regional Police Commission (“PMRPC”). Eventually, the Plaintiff received notice that the building had begun to suffer alleged water damage. In September 2009, PMRPC filed suit against the Plaintiff in the Court of Common Pleas of Monroe County, Pennsylvania. That lawsuit raised four (4) claims against the Plaintiff: (1) breach of contract; (2) breach of warranty; (3) breach of the duty of good faith; and (4) negligence in the construction of the building.

The Plaintiff tendered the lawsuit to OCIC and AFCC and requested a defense. After conducting an investigation, the Defendants declined to do so.

The Plaintiff then filed a Complaint against OCIC and AFCC in the Court of Common Pleas of Lackawanna County, Pennsylvania. The Complaint raised two counts. Count I alleged bad faith, contending that the Defendants did not conduct a reasonable investigation of the claims and unreasonably refused to defend the Plaintiff in the Monroe County action. Count II raised a breach of contract claim, contending that the Defendants refused to comply with the terms of the insurance contract by refusing to provide the Plaintiff with a defense. Defendants then removed the case to the Middle District court.

Shortly after removal, OCIC moved to dismiss the Complaint, alleging that it did not issue the insurance policy in question; therefore, no contract existed between OCIC and the Plaintiff. The Court denied OCIC’s Motion to Dismiss and discovery commenced. After discovery was completed, the Defendants filed Motions for Summary Judgment.

On his January 6, 2012, the United States District Court for the Middle District of Pennsylvania granted the Defendants’ Motions for Summary Judgment and focused on three (3) issues: (1) whether OCIC was a proper defendant in the case; (2) whether OCIC

and AFCC breached a duty to defend the Plaintiff in the underlying action; and (3) if so, whether OCIC and AFCC acted in bad faith in not defending the Plaintiff.

On the first issue, the Court agreed with OCIC in that it was not a proper defendant in the case because OCIC did not issue the policy from which the Plaintiff's claim arose. The Plaintiff attempted to create an issue of fact by pointing to a single reference to OCIC in the claim correspondence, however, Judge Mariani concluded, "...in the face of all the aggregate uncontradicted evidence that AFCC underwrote the policy, this one instance in which OCIC was referred to in writing as the underwriter is insufficient to survive a summary judgment motion." *Id.* at \*8.

Citing well-settled Pennsylvania case law, *Kvaerner Metals Div. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006), Judge Mariani stated that in determining whether an insurer has a duty to defend the insured, a reviewing court must look *only* at the underlying complaint. *L.R. Costanzo* at \*9. The underlying complaint in this action contained four (4) counts: (1) breach of contract; (2) breach of warranty; (3) breach of good faith; and (4) negligence by Costanzo in the building of the project. *Id.* at \*10. Judge Mariani concluded, "on its face, the Complaint alleges faulty workmanship as the basis for its counts/claims." *Id.* at \*11.

The Judge went on to acknowledge that it is well settled that faulty workmanship is not an "occurrence" under Pennsylvania law. *Id.* at \*12. He stated, "there is substantial case law in Pennsylvania and the Third Circuit stating that breach of contract, breach of warranty, and even negligence claims do not give rise to an 'occurrence' when it means 'accident' as it does here." *Id.* at \*13. Furthermore, relying on *Millers Capital Ins. Co. v. Gambone Bros. Dev. Co.*, 941 A.2d 706 (Pa. Super. Ct. 2007), he explained, "Even if Plaintiff's work itself were not faulty and a subcontractor's work were faulty, there is no duty to defend. *Id.* at \*15.

On the occurrence issue, Judge Mariani held:

Because the Underlying Complaint squarely alleges faulty workmanship (rather than an "accident") as the basis of its claims against Plaintiff, Defendants had no duty to defend Plaintiff in the underlying case. Plaintiff argues that its work was not faulty but was in accordance with the architect's faulty design. That argument is appropriate for the underlying case but not here. Even were the Court to decide that the Underlying Complaint alleges defective design by the architect, there is still no "occurrence" because Plaintiff's argument is analogous to asserting faulty workmanship by a subcontractor, which is controlled by *Gambone*. Furthermore, a sister court has held that "negligent or defective design, in a case in which the product is designed pursuant to and in accordance with a contract, is necessarily part and parcel of the contract performance" under Pennsylvania law. *Id.* at \*16, citing *National Fire Ins. Co. v. Robinson Fans Holdings, Inc.*, 2011 U.S. Dist. LEXIS 37941 (W.D. Pa. Apr. 7, 2011).

The Judge concluded, “because faulty workmanship cannot constitute an ‘occurrence,’ Defendants are awarded summary judgment on this issue.” *Id.* at \*17.

Finally, in his discussion of the Plaintiff’s bad faith claim, Judge Mariani relied on the oft-cited case of *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. Ct. 1994), which holds, “[u]nder Pennsylvania law, to recover for bad faith, the insured must show that the insurer ‘did not have a reasonable basis for denying’ the requested relief, and ‘knew or recklessly disregarded its lack of reasonable basis in denying the claim.’” *L.R. Costanzo* at \*18. After reviewing the evidence presented in the parties’ Statement of Material Facts, Briefs and Replies, including the claim log notes and deposition testimony, the Judge concluded that “Because there was no ‘occurrence’ under the policy, Defendants did not act in bad faith in denying a defense to Plaintiff in the underlying case. Further, the record shows that Defendants engaged in a thorough inquiry before determining there was no duty to defend.” *Id.* at \*19.

**PRACTICE NOTES:**

This opinion further supports the *Kvaerner* decision that in Pennsylvania faulty workmanship does not constitute an occurrence under a CGL. Moreover, it also confirms that courts will scrutinize insurer’s bad faith claims pursuant to the *Terletsky* case and seek some evidence of ill will or bad intent on the part of the insurer. Without such evidence, and especially when insurers conduct reasonable and proper claim investigations, bad faith claims should be dismissed.

For a complete copy of the decision, please see the attached link

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