

## Georgia Supreme Court Broadens Definition of “Occurrence” in CGL Policies

By Phil Savrin and Leanne Prybylski

In a decision issued March 7, 2011, the Supreme Court of Georgia ruled that the term “occurrence” as used in commercial general liability (CGL) policies is satisfied where the loss is unintended even if the insured acted intentionally. Prior to this ruling, Georgia courts were divided on whether the policies distinguished between intentional acts and unintended results. The Supreme Court’s ruling in *American Empire Surplus Lines Insurance Company v. Hathaway Development Company, Inc.* now makes clear that an occurrence can arise from intentional acts performed negligently provided unexpected damage results. The Supreme Court has thereby broadened the scope of coverage available to insureds, particularly in construction defect cases alleging faulty workmanship, and is in line with an emerging trend in other jurisdictions that include Florida, South Carolina and Texas.

Before the Supreme Court issued its decision, Georgia courts struggled to apply the term that is defined as an “accident.” Borrowing from other contexts (such as voluntary intoxication), early decisions found that damage was not accidental where the insured acted purposefully even if the outcome was not intended. In the construction arena, this concept was applied to find, for example, that a contractor would not be covered if his construction method produced a shoddy result even though the result was unintended. In *Owners Insurance Company v. James*, for example, a contractor installed siding in such a manner that allowed water intrusion that damaged the structure. Because the installation method was intended, there was no “occurrence” even though the damage was not intended. In reaching this conclusion, the court distinguished an “accidental injury” from an “injury from accidental means;” although an “accidental injury” is unexpected, it is not an occurrence because it results from an intentional act, whereas an “injury from accidental means” is an occurrence because the injury, as well as the act that causes it, is unintentional.

A number of decisions followed the reasoning of *James* in making this distinction. These decisions were seemingly in conflict with a subsequent decision of the Court of Appeals in which the absence of support beams in adding a second-story to a residence caused damage to the first floor. In *SawHorse, Inc. v. Southern Guaranty Insurance Company*, the court noted that coverage has been found to exist where the insured’s work causes damage to “other property” when there is damage to “other property” due to defective work, relying on the limited reach of the business risk exclusions. Based on that case law, the Court of Appeals reasoned that damage to the first floor could constitute an “occurrence” whether or not the absence of support beams was intentional, to the extent that it was caused by the absence of support beams in constructing the addition on the house.

In the *Hathaway* case, the Supreme Court has resolved the inconsistency in the case law by holding that “an occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property.” In that case, a plumbing subcontractor performed work on three of projects, including using a 4-inch pipe when the contract called for a 6-inch pipe, causing damage to surrounding properties. The Supreme Court applied the meaning of accident to include the plumbing contractor’s acts because the result was not intended. Quoting a Texas case, the Court wrote, “[A] deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly.”

The Supreme Court’s ruling is a victory for Georgia contractors because the decision expands coverage to include unintended damage even if the faulty workmanship was intentional. In so doing, the Supreme Court essentially requires that the “expected or intended” injury exclusion must apply for an insurer to show that the “occurrence” definition has been met. Insurers can still be able to rely on the “business risk” exclusions to preclude coverage for the damage to insured’s work itself. The scope of coverage for construction defect claims has been broadened significantly, however, by this recent pronouncement by the Supreme Court.

For more information, contact [Phil Savrin](mailto:psavrin@fmglaw.com) at 770.818.1405 770.818.1405 or [psavrin@fmglaw.com](mailto:psavrin@fmglaw.com) or [Leanne Prybylski](mailto:LeannePrybylski@fmglaw.com) at 770.818.1404 770.818.1404 or [cprybylski@fmglaw.com](mailto:cprybylski@fmglaw.com).