



# Case Alert

## SDV Scores Significant Victory in the Connecticut Supreme Court Case of *Capstone v. American Motorists Ins. Co.* 308 Conn. 760 (2013)

SDV Attorneys Jeffrey J. Vita and David G. Jordan, Plaintiffs' Counsel in the *Capstone* case, offer their impressions of the Connecticut Supreme Court's decision.

### What are the key holdings?

The Court's holdings concerning the meaning of "occurrence" and "property damage" under a standard Commercial General Liability (CGL) policy, in the context of a construction defect claim, are the most significant aspects of the decision.

#### **A. The Meaning of "Occurrence"**

The Court adopted the majority view that an "occurrence" under a CGL policy includes faulty or defective construction work that was unintended by the insured. In so holding, it squarely rejected the insurance company's arguments that damage to project work lacks fortuity, is purely a contractual issue, and that CGL policies do not act as surety bonds. This is a significant victory for contractors working in Connecticut and may also serve as persuasive authority in states where the highest court has not yet addressed the issue. To review the status of the law nationwide, [click here](#) to link to SDV's 50 state survey.

#### **B. The Meaning of "Property Damage"**

The Court found that defective work, in and of itself, does not constitute "property damage" under a CGL policy, but that such work must cause damage to other non-defective work. For example, installing defective windows would not constitute "property damage", but losses caused by water entering through the defective windows would be property damage.

The Court also addressed whether a building's exposure to carbon monoxide (CO) involves "property damage", and concluded that the answer depends upon the definition being applied. Specifically, it found that CO exposure does not involve "physical injury to tangible property" as required under the primary CGL definition of "property damage", but further stated in a footnote that CO potentially satisfies the secondary CGL definition of "property damage", which is "loss of use of tangible property that is not physically injured." If, for example, the CO fumes required mandatory evacuation of the property, such evacuation could amount to a loss of use of uninjured property (illustrating the significance of the CGL policy's secondary definition of "property damage").

### What other important issues were decided?

The Court addressed two other important insurance coverage issues: (1) whether an insurer's failure to investigate an insurance claim can provide the basis of a bad faith cause of action, and (2) whether an insurer is responsible to pay the full amount of a settlement (encompassing both covered and uncovered claims) in circumstances where the insured is wrongfully denied coverage.

#### **A. Lack of an Investigation Alone is not Bad Faith**

Insofar as the insurer's duty to investigate a claim is discretionary, pursuant to the terms of the relevant CGL policy, the Court held that a failure to investigate, standing alone, does not amount to bad faith. However, the Court further noted that an investigation is often necessary to fairly assess coverage and strongly cautioned insurers against refusing to investigate. Thus, stating that in cases where the insurer is found to be in breach of policy obligations (be it a wrongful denial of coverage or some other breach), the Court indicated the lack of an investigation provides "key" evidence of bad faith.

#### **B. Wrongful Denial and the Reasonableness Hearing**

When an insurer wrongfully denies coverage and the insured settles adverse claims involving both covered and uncovered liabilities prior to being sued, the Court determined that the insurer can challenge the reasonableness of the settlement, both in terms of the amount paid and the scope of the settlement (i.e. the proportion of the settlement reflecting allegations subject to the insurer's broad duty to defend). In such cases, the burden to establish reasonableness is placed upon the insured. However, the insured is only required to show that the settlement resolved claims implicating the insurer's duty to defend (it does not have to show that the adverse claims triggered a duty to indemnify). In our opinion, the Court's intention was to strike a balance between providing the insured with a fair remedy as a consequence of the insurer's contractual breach while not providing a windfall (or excessively penalizing the insurer) by requiring compensation for allegations that were never covered by the policy. Unfortunately, the practical application of the reasonableness hearing is unclear and is likely to be a source of contention and confusion between the courts and the parties to the litigation.

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