

Case Alert



South Dakota Supreme Court Holds That Faulty Workmanship Constitutes an “Occurrence”

The South Dakota Supreme Court recently determined that damage resulting from a subcontractor’s failure to test soil compaction before constructing a home constituted an “accident” and was therefore an “occurrence” under a commercial general liability (CGL) policy.

In *Owners Ins. Co. v. Tibke Construction, Inc.*,¹ the homeowners hired Tibke Construction, Inc. to build a new house, and Tibke Construction hired subcontractor Jerry’s Excavating to perform excavation work. The homeowners contended that Jerry’s Excavating failed to do soil compaction testing before commencing construction, which resulted in the home being built on highly expansive soils, leading to damage including excessive settlement, cracking and structural unsoundness.

The homeowners sued Tibke Construction and Jerry’s Excavating for the damages to their home. Tibke Construction tendered a claim for defense and indemnity to its CGL insurer, Owners Insurance Company (Owners), which disputed coverage but agreed to defend Tibke Construction under a reservation of rights.

Owners then filed a declaratory judgment action seeking a determination that the CGL policy did not provide coverage for Tibke Construction against the homeowners’ allegations. The policy covered property damage caused by an “occurrence,” which was defined as an accident. Owners argued that a claim arising from incorrectly performed work, such as failure to test the soil, does not constitute an accident because a CGL policy is not meant to cover faulty workmanship. Using lack of fortuity as a basis for this argument, Owners noted that the loss arose “from the defendants’ intentional choice not to conduct soil testing and their deliberate decision to construct the house on that soil.”

The South Dakota Supreme Court rejected Owners’ argument, stating that faulty workmanship can cause unexpected and fortuitous losses or damage, which constitutes an “occurrence” because the result is neither expected nor intended by the insured. In this case, “the failure to test the soil was not an intentional or deliberate action but an unplanned omission, which caused an unexpected result.”

This pro-policyholder decision should have a positive impact for policyholders seeking coverage for damages caused by defective construction in South Dakota. To see how defective construction is treated in your jurisdiction, see our survey:

[Defective Construction as an “Occurrence.”](#)

For more information about this case contact Samantha Martino at smm@sdvlaw.com.

1. 2017 S.D. 51 (2017).