

WRF Prevails on Summary Judgment; No Coverage for Construction Defects Claim under Pennsylvania Law

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Washington, DC—A Pennsylvania trial court has granted summary judgment to several Zurich entities represented by Wiley Rein & Fielding. The court held that the insurers owed no duty to defend or indemnify the policyholder for EIFS construction defects claims because the underlying complaints sounded in contract and thus did not allege an "occurrence" within the meaning of the policies.

The policyholder was the developer of a mixed commercial and residential development. After being sued by several homeowners for breach of their purchase agreements based on construction defects, the policyholder sought coverage for suits from its general liability insurers. The insurers denied coverage based on, *inter alia*, lack of an occurrence within the meaning of the policies. Thereafter, the policyholder filed this litigation seeking a declaration that the insurers were obligated to defend him and his company in the underlying actions and to indemnify him from all liability resulting therefrom. The insurers moved for summary judgment based on the lack of an occurrence.

The trial court granted the insurers' motion. The court first held that breach of contract claims do not allege an "occurrence" pursuant to *Redevelopment Authority of Cambria County v. International Insurance Co.*, 454 Pa. Super. 374 (1996) and its progeny. Turning to the case at bar, the court observed that the issue was whether the underlying claims for which the policyholder sought coverage sounded in tort, which would allege an occurrence, or in contract,

Practice Areas

Insurance
Litigation

which would not. The court observed that Pennsylvania courts employ the "gist of the action" doctrine to determine whether or not an action sounds in contract. If the gist of the action is "the wrong ascribed to the defendant" with "the contract being collateral," then the action sounds in tort. Conversely, if the gist of the action is the contract itself, then the action sounds in contract. Applying the "gist of the action" doctrine, the court held that the underlying actions, which contained causes of action for breach of contract, breach of express and implied warranties, detrimental reliance, and rescission, sounded in contract. The court reasoned that "the gist of all of these claims is the Policyholder's failure to perform his contractual obligations." Moreover, the court dismissed policyholder's attempt to create coverage based on the subcontractor exception to the "your work" exclusion, noting that the scope of an exclusion is "immaterial" when the policyholder has not demonstrated that its claim falls within the coverage grant.