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## Case Bulletin: Insurance Law

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Pennsylvania Supreme Court rules that insurer has no duty to defend or indemnify contractor insured under CGL policies for faulty workmanship claims.

*Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*  
Decided October 25, 2006.

In *Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, filed October 25, 2006, the Supreme Court of Pennsylvania held that National Union Fire Insurance Company of Pittsburgh, Pennsylvania has no duty to defend or indemnify Kvaerner Metals, in a suit filed by Bethlehem Steel Corporation for breach of contract and breach of warranty, for claims arising from its contract with Kvaerner for the design and construction of a coke oven battery. Examining two CGL policies, the court held that “the definition of accident” required to establish an “occurrence” under the policies cannot be satisfied by claims based upon faulty workmanship”. Bethlehem asserted only property damage from poor workmanship to the product itself, the Court concluded. If it were to find such claims covered under CGL policies, the Court would convert those policies into performance bonds. The Court declined to do so, especially since builders risk coverage and professional liability coverage is “readily available for the protection of contractors”. (Slip opinion, p.16-17)

The policies did not define the term “accident”; therefore, the Court looked to common definitions of the term. An accident, the Court said, is “an unexpected and undesirable event” or “something that occurs unexpectedly or unintentionally”. “The key term ‘unexpected’...implies a degree of fortuity that is not present in a claim for faulty workmanship”. (Slip op. p. 14)

Bethlehem sued Kvaerner for breach of contract and breach of warranty. Bethlehem asserted that Kvaerner agreed to build the battery according to plans and specifications made part of the contract, warranted that its materials, equipment and work would be free from defect and agreed to repair or replace any defective work or materials. Bethlehem claimed that the battery was damaged and did not meet contract specifications and warranties or industry standards for construction. Bethlehem sent Kvaerner a “non-performance list”, and incorporated that document into its complaint; the document recited numerous defects in the battery. Bethlehem sought the cost to replace the battery or the difference in value between the defective battery and the battery that Kvaerner warranted that it would deliver.

Kvaerner sought a defense and indemnity under two CGL policies, one claims made, the other an occurrence policy. Both policies covered “property damage” caused by an “occurrence”, defined as an accident. The insurer declined to defend or indemnify, and Kvaerner filed a declaratory judgment action in Northampton County, Pennsylvania. The insurer moved for summary judgment, asserting that Bethlehem had not alleged “property damage” “caused by an occurrence”, and alternatively, that the damages sought were excluded by the policies’ business risk/work product exclusions. The trial court granted the insurer’s motion, principally on the basis that Bethlehem had not alleged that the damages were caused by accident.

In opposing the insurer’s motion, Kvaerner offered an experts’ report in which two experts said that the damages were caused by displacement and movement of the battery’s roof, which occurred because Kvaerner grouted the bricks earlier than had been scheduled, and heavy rains on October 31, 1994, could have damaged the roof joints. Kvaerner argued that because it did not intend or expect the early grouting of the bricks or the heavy rains to cause movement in the roof and thereby damage to the battery, the battery’s damages were caused by an “accident”. Furthermore, Kvaerner asserted that the policies’ completed operations coverage applied, claiming that its subcontractor permitted the early grouting of the roof bricks.

The Superior Court looked to Kvaerner’s expert report, and found that an issue of fact arising from that evidence regarding the cause of the damages prevented summary judgment. The court also found that questions concerning whether any damage may have been caused by subcontractors’ work prevented summary judgment on the basis of the business risk/work product exclusions.



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In addition to its holding that a claim for faulty workmanship resulting in damage to the insured's product is not a claim for damages caused by an 'accident', the Supreme Court held that the Superior Court erred in looking beyond the allegations raised in Bethlehem's complaint in assessing the insurer's duty to defend and indemnify. The duty to defend, the Court reminded, is determined solely from the allegations of the complaint.

Given its conclusion that Bethlehem did not plead property damage caused by an occurrence, the Supreme Court did not address whether the business risk/work product exclusions also may have precluded coverage.

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