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Construction Defect Claims: A 2017 Update — Part Two

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This commentary first appeared in the February 2, 2018 issue of Mealey's Litigation Report Construction Defects Insurance.

While decisional authority addressing potential coverage for construction defect claims under Commercial General Liability Policies continues to evolve, many decisions in 2017 relied upon long recognized doctrine to decide contested matters. While such decisions allow the construction industry a reasonable basis to anticipate what might fall within the coverage of their policies, a few decisions offer a reminder to practitioners to monitor developing case law.

For example, in New Jersey, a court relied upon the long-recognized "entire controversy doctrine" to hold that it is neither fair nor efficient to fragment a single controversy into separate actions as such fragmentation can harass litigants, delay final adjudication, and waste judicial resources. In a slightly different twist, an Iowa court held that an insurer had an obligation to consider the policy, the complaint, and all relevant facts available to it in deciding whether to defend, but the court added that expert reports available to the insurer were sufficient to place the insurer on notice that the complaint alleged damages within the insuring clause of the policy. Meanwhile, a California Court applied the "but for" test, long recognized as the test in assault and battery matters, to decide that a mold exclusion applied because the case would not have been brought "but for" the mold claim.

This article, the second of two parts, highlights numerous decisions from across the country over the past twelve months that affirm certain rules upon which the construction industry has long relied, along with several other rulings that offer new developments the industry should monitor going forward.

Washington

All Risk Policy

Eagle Harbour Condo. Ass'n v. Allstate Ins. Co., No. C15-5312-RBL, U.S. Dist. LEXIS 54761 (W.D. Wash. Apr. 10, 2017), *reconsideration denied*, No. C15-5312RBL, U.S. Dist. LEXIS 70793 (W.D. Wash. May 9, 2017)

A condominium association sued its insurers after being denied coverage for hidden water damage. Allegedly, wind-driven rain and improper construction permitted water to penetrate the building resulting in decades of damage. The insurers argued the damage was caused by poor construction and

inadequate maintenance. The association responded that the policies did not exclude damage caused by wind-driven rain.

The association admitted that there were four potential proximate causes for its loss, i.e. inadequate construction, wind-driven rain, seepage of water, and/or deterioration. The insurers responded that the policies did not provide coverage for inadequate construction, seepage, or deterioration. The association argued that that wind-driven rain was a distinct and fortuitous peril.

The court reasoned that the question of which peril constituted the proximate cause was left to the fact finder. While the policies excluded repeated seepage of water along with specific weather losses, rain was not a listed exclusion, and thus would be covered. Moreover, while the policy excluded deterioration, it did not do so for weather deterioration. Lastly, in denying the insurers' motions for summary judgment, the question of whether the association knew hidden damage from wind-driven rain was likely to occur was left to the jury.

> **Practice Point:** An all risk policy must explicitly exclude weather, storm, and wind perils for coverage to be precluded.

Oregon
Prior Negligent Act
Alkemade v. Quanta Indem. Co., 687 F. App'x 649 (9th Cir. 2017)
The plaintiffs bought a house built on an inadequate foundation, which caused structural damage. The builder repaired the damage and hired an engineer to install a new foundation to prevent further damage. The new foundation was also improperly installed, causing additional structural damage.

The plaintiffs sued the builder. The builder assigned its rights to sue its insurers, who previously denied coverage pursuant to "known damages" provisions. Specifically, the policies excluded coverage for any damage known by the insured that occurred before the policy period began; and if any such damage was known to the insured, then "any continuation, change, or resumption" of that damage was deemed known and excluded. The insurers claimed that the second foundation was a "continuation, change, or resumption" of the previously known property damage and was thus excluded.

On appeal, the plaintiffs argued that the first round of damage did not "continue, change, or resume" when later damage took place after a repair that would have resolved all damage. In interpreting Oregon law, the court held that if an insured asserts a plausible and reasonable interpretation of an insurance policy, this trumps any plausible and reasonable interpretation put forth by the insurer. The Court opined that if the policy language "continuation, change, or resumption" modified "damage previously known," a reasonable interpretation is that both the previously known damage and the later damage must share a cause. Since there was a possibility that the more recent damage was caused by the negligently installed newer foundation, it was reasonable and plausible to find that there were two separate causes of damage.

> **Practice Point:** Under Oregon law, an insured may prevail if its differing interpretation of a policy term or condition is plausible and reasonable.

Nevada
OCIP Damages

Westgate Planet Hollywood Las Vegas, LLC v. Tutor-Saliba Corp., No. 65130, 2017 Nev. Unpub. LEXIS 320 (May 5, 2017)
The appellant contracted with the respondent to construct the Planet Hollywood Towers. The respondent hired various subcontractors. During the project, the appellant stopped paying the respondent. The respondent recorded a mechanic's lien and sued to foreclose on it. The appellant counterclaimed for offsets and construction defects. The matter went to trial, but certain OCIP issues were decided on summary judgment.

By way of background, the appellant's parent company initially established the OCIP, which provided insurance for portions of the project. After establishing the OCIP, the appellant, or its parent, allowed the upper $75 million of the $100 million 10-year tail coverage to lapse mid-litigation. The respondent paid for replacement coverage and was reimbursed by the parent.

The respondent sued for breach of contract concerning the lapse in OCIP. The district court granted summary judgment in favor of the respondent, treating the respondent's expense for the replacement coverage as damages.

On appeal, the appellant argued that the OCIP summary judgment decision was incorrect because it timely reimbursed the respondent for the payment of replacement coverage. The court agreed, finding that the only damages for the lapse in OCIP coverage were potential future damages resulting from the coverage gap. These potential damages were not yet ripe.

Practice Point: OCIP liability must be realized to be recoverable.

Arizona
Duty To Defend
Teufel v. Am. Family Mut. Ins. Co., No. 1 CA-CV 15-0736, 2017 Ariz. App. Unpub. LEXIS 558 (Ct. App. May 9, 2017)
The plaintiff purchased an undeveloped lot and obtained a homeowner's policy from the defendant, which remained in place until the plaintiff sold the completed residence. After the sale, the plaintiff obtained a different homeowner's policy from the defendant. The purchaser sued the plaintiff for breach of contract, negligence, and fraud for allegedly improper excavation. The plaintiff tendered his defense, but the defendant denied under both policies.

The plaintiff filed a declaratory judgment action against the defendant. With regard to the first policy, coverage only existed for physical damage to the property resulting during the policy period. The plaintiff alleged that the property was immediately damaged by the faulty excavation, but there were no claims of physical damage during this policy period in the underlying action. The court found this policy was not triggered.

With respect to the second policy, the court found that the "contractual liability" exclusion did not apply because the alleged negligence, namely the improper excavation, "was entirely independent of the later real estate transaction." Likewise, the "business pursuits" exclusion which excluded coverage for property damage arising out of business pursuits did not apply because the plaintiff was alleged to be a "builder-vendor." However, the negligence alleged did not require that the plaintiff qualify as a "builder-vendor." The court opined that such claims were disputed and, while it is possible that the exclusion could apply, "the facts do not *compel* that conclusion on this limited record." (emphasis in original)

Practice Point: Courts will likely require that allegations must squarely fit under an exclusion before precluding coverage.

Ohio

Exceptions To Exclusions

Ohio Northern University v. Charles Construction Services, Inc., 77 N.E.3d 538 (Ohio App. 3d Dist. 2017)

A university initiated a lawsuit against its general contractor, which it had engaged to build a luxury hotel on the university campus. After the hotel was complete, the university discovered evidence of water intrusion and moisture damage throughout the hotel. During remediation, the university discovered structural defects to the wood sheathing and rim joists, which required the complete removal and replacement of the brick and masonry façade.

The general contractor's commercial general liability insurer, Cincinnati Insurance Company (CIC), filed a motion for leave to intervene and a cross-claim for declaratory judgment against the general contractor, asking the trial court to declare that the insurer's policy did not provide coverage to the general contractor with respect to any of the claims asserted by the university. The trial court ruled in favor of the insurer, and the university and the general contractor appealed.

The disagreement pertained to whether damages caused by the work of subcontractors, manifesting after the project was completed, comprised an "occurrence" under the products-completed operations hazard. The parties disputed application of a decision by the Supreme Court of Ohio in *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, in which the court held that damage to an insured's own construction work did not constitute an "occurrence" under a CGL policy. That decision noted that "the key issues are whether the contractor controlled the process leading to the damages and whether the damages were anticipated." The university and the contractor argued that the *Custom Agri* decision did not apply the work of subcontractors, and that the policy analyzed in *Custom Agri* did not include an exception that brought their damages within the products-completed operations hazard.

The court agreed with the plaintiffs and noted that the policy contained an exclusion for any damages to the insured's work, whether performed by the insured or on its behalf, but the policy also included an exception to that exclusion for damages that fall within the products-completed operations hazard. The policy contained another exclusion for damage to the insured's work included in the products-completed operations hazard, but there was an exception to that exclusion for work performed by subcontractors. In short, the policy exceptions specifically applied to damages to the work of subcontractors arising after project completion. The court ruled that inclusion of these exceptions precluded an interpretation of *Custom Agri* that defective construction damages can never constitute an occurrence. Therefore, the court held that the plaintiffs' damages were covered under the policy.

Practice Point: Exceptions to policy exclusion will be enforced by courts if deemed clear, unambiguous, and applicable to the particular circumstances of the claim.

Iowa

Consequential Loss And The "Your Work" Exclusion

Van Der Weide v. Cincinnati Ins. Co., No. C14-4100-LTS, 2017 U.S. Dist. LEXIS 4469 (N.D. Iowa Jan. 12, 2017)

Plaintiff Van Der Weide brought claims for breach of insurance contract, bad faith, and punitive damages, individually and as assignee of Bouma & Company, Inc. and United Fire & Casualty Co. The Cincinnati Insurance Company had issued commercial general liability and umbrella policies to Bouma, which had contracted with Van Der Weide to construct a house in Orange City, Iowa in 1996. After Cincinnati's policies expired, Bouma purchased insurance policies from United Fire.

After moving into the house, Van Der Weide observed a small amount of water ponding in an unfinished storeroom in the basement. The ponding reoccurred periodically after rain. Van Der Weide alerted Bouma of the leak but did not claim that any damage resulted. Years later, in August 2010, Van Der Weide discovered significant water damage. Van Der Weide and Bouma retained experts that concluded the windows and masonry installation was defective.

In 2011, Van Der Weide sued Bouma. United Fire defended Bouma under a reservation of rights and tendered the defense and indemnity obligations to Cincinnati. Cincinnati rejected the tender and denied a duty to defend contending the alleged defects in Van Der Weide's home were discovered after Cincinnati's policy period had ended. Bouma confessed judgment in Van Der Weide's favor in the amount of $2,000,000 in exchange for a covenant not to execute, and Bouma and United Fire assigned their rights against Cincinnati to Van Der Weide.

Under Iowa law, Cincinnati had an obligation to consider the policy, the complaint, and all relevant facts available to it in making its decision whether to defend. Among these facts were Bouma and Van Der Weide's expert reports indicating that the damage was caused by defective masonry installed during construction, which was during Cincinnati's policy period. The court held that Cincinnati was on notice that the complaint alleged damages that occurred during the policy period.

The court also held that the complaint alleged covered damages. In particular, following a 2016 decision by the Iowa Supreme Court in *Nat'l Sur. Corp. v. Westlake Inv.*, the alleged damages due to defective masonry constituted an "occurrence" because the defective work was performed by a subcontract and because it caused damages beyond the insured's own work product. Moreover, the "your work" exclusion did not preclude a duty to defend because it contained a subcontractor exception. However, the "your work" exclusion would remove from coverage any damages to work performed by Bouma itself. Cincinnati also relied on the "impaired property" exclusion, but the court held that the exclusion did not apply because the exclusion addressed property that is not "your work" but incorporates "your work." The defective masonry did not incorporate Bouma's work. As a result, the court held that Cincinnati had an obligation to defend Bouma and to indemnify Bouma except to the extent Van Der Weide's damages were to work performed by Bouma.

> **Practice Point:** The duty to defend is determined from consideration of the allegations in the complaint, but also requires consideration of facts known to the insurer.

California

The Mold Exclusion And The "But For" Test

Saarman Construction, Ltd. v. Ironshore Specialty Ins. Co., 230 F.Supp. 3d 1068 (N.D. Cal. 2017)

Saarman Construction, Ltd. was engaged to conduct various repairs to a condominium complex in South San Francisco, California that had experienced significant water intrusion since construction. After Saarman completed its work, mold damage, plumbing leaks, and more water intrusion were discovered in one of the condos. In subsequent litigation, the condo owners and the HOA alleged that Saarman and its subcontractors negligently performed repair work to the building.

Ironshore issued a CGL policy to Saarman for dates including the time when the condo owners alleged they discovered the damages caused by Saarman. When Saarman sought defense and indemnity from Ironshore for the suit by the condo owners and the HOA, Ironshore denied coverage based on the "Mold, Fungi, or Bacteria" exclusion and the "Continuous or Progressive Injury or Damage" exclusion.

Under California law, Ironshore's duty to defend depended not only on the allegations of the complaint and the provisions of the policy, but also on extrinsic facts in the insurer's possession at the time it denied coverage that might present the possibility of coverage or conclusively eliminate any potential for liability.

The court recognized tension between the "Mold, Fungi, or Bacteria" exclusion — which clearly eliminated coverage not just for mold claims but also for any suit that included a mold claim, regardless of whether other potentially covered claims were included in the suit — and holdings by California courts that, when a suit includes both non-covered and potentially covered claims, the insurer has a duty to defend the entire lawsuit. Because California courts had not addressed the issue, the court looked to the reasoning in a New York case, *Mt. Vernon Fire Ins. Co. v. Creative Housing Ltd.* There, the court held that an exclusion removing coverage for suits that included allegations of assault and battery applied only if the suit would not have been brought "but for" the allegations of assault and battery. Thus, in the Saarman case, the mold exclusion would apply only if the case would not have been brought "but for" the mold claim. While Ironshore argued that the language of the mold exclusion did not support such an interpretation, the court held that a contrary interpretation would conflict with California law requiring insurers to defend suits that include both non-covered and potentially covered claims. The "but for" test balanced the parties' freedom of contract against that requirement.

However, the court found that the "Continuous or Progressive Injury or Damage" exclusion applied to preclude coverage. The exclusion removed coverage for any damages resulting from the insured's work performed prior to policy inception. As Saarman's work was finished at least three years before the policy period, there was no coverage for the claim. The court therefore granted Ironshore's motion for summary judgment on all of Saarman's claims.

> **Practice Point:** Applicability of a mold exclusion can be determined under a "but for" test, where the exclusion will only apply if suit would not have been brought but for the mold claim.

South Carolina

A Reservation Of Rights Letter Is Relevant To Adversity For Federal Court Jurisdiction

Baker Roofing Co. v. American Guar. & Liab. Ins. Co., No. 16-CV-3776-PMD, U.S. Dist. LEXIS 25144 (D.S.C. Feb. 23, 2017)

In a procedural decision, the federal district court for the District of South Carolina granted plaintiff Baker Roofing Co.'s motion to remand to state court after improper removal by two of the defendants, American Guaranty and Liability Insurance Company and Zurich American Insurance Company.

Baker sought coverage from American, Zurich, and Builders Premier Insurance Company for a construction defect lawsuit. Builders Premier provided a defense under a reservation of rights, but American and Zurich denied coverage. Baker brought suit against all three defendants seeking declaratory judgment and bringing bad faith claims against American and Zurich. American and

Zurich removed the case to federal court without Builders Premier's consent. Baker brought a motion to remand, supported by Builders Premier and opposed by American and Zurich.

Ordinarily, defendants' removal to federal court under 28 U.S.C. § 1446(a) requires unanimity of all defendants. However, there is an exception: a nominal defendant, one with no immediately apparent stake in the litigation, need not join in or consent to removal. American and Zurich argued that Builders Premier was such a party because it had already agreed to provide a defense to Baker under a reservation of rights. However, the court ruled that Builders Premier's reservation of rights gave it a dog in the fight. Builders Premier's position was that it had no coverage obligation to Baker. Indeed, it had asked that Baker's declaratory judgment claim against it be dismissed. That position gave the court no concern that Baker and Builders Premier lacked adversity. Since Builders Premier was not a nominal defendant, its consent and joinder in the removal were required. American and Zurich had failed to obtain them, and therefore the court remanded the case to state court.

> **Practice Point:** An insurer providing a defense subject to a reservation of rights is not deemed a nominal defendant that can avoid the requirement to join or consent to removal to federal court under 28 U.S.C. § 1446(a).

Iowa
Anti-Concurrent Causation Provisions
Southern Ins. Co. v. CJG Enterprises, Inc., No. 15-CV-00131-RGE-SBJ, U.S. Dist. LEXIS 129513 (S.D. Iowa Feb. 10, 2017)
Southern Insurance Company's insureds had engaged CJG Enterprises, Inc. to construct barns on their property. CJG purchased pre-engineered designs and structures for the barns from Lester Building Systems, LLC and assembled them on the insureds' properties. Later, a windstorm came through the area and damaged the roofs to the barns. The insureds filed claims with Southern, who concluded that the claims were covered and made payment to the insureds. Southern then hired an engineer to inspect the barns and determined that the windstorm would not have damaged the structures if they had been properly designed and constructed. Southern therefore filed suit as subrogee of its insureds against CJG and Lester.

Lester filed a motion for summary judgment, arguing that losses due to negligent design or construction were not covered under Southern's policy and that as a result Southern's payments to its insureds had been merely voluntary and did not give Southern the right to subrogate. The court examined the provisions of Southern's policy to determine whether the losses were covered.

The court determined that the policy covered damage due to windstorms, but it also contained both (1) an exclusion for losses due to negligent design or construction of property ("Defects Exclusion") and (2) an anti-concurrent causation clause. However, the anti-concurrent causation clause appeared in the preface to a list of exclusions that did not include the Defects Exclusion. In contrast, the section where the Defects Exclusion appeared did not have a prefatory anti-concurrent causation clause. As a result, the court held that no anti-concurrent causation clause applied to the Defects Exclusion. Moreover, in the absence of anti-concurrent causation language, a loss is covered if it is the result of both covered and non-covered causes. Thus, the insured's loss was covered under the policy, and Southern had a right to subrogate.

> **Practice Point:** In the absence of anti-concurrent causation language, a loss is covered if it is the result of both covered and non-covered causes.

South Carolina

An Additional Insured Is Not A Third Party To The Insurer/Insured Relationship

UFP Eastern Division, Inc. v. Selective Ins. Co. of South Carolina, No. 15-2801-RMG, 2017 U.S. Dist. LEXIS 17082 (D.S.C. Feb. 6, 2017)

UFP was a first-tier framing subcontractor for the construction of 59 single- and multi-story residential buildings in South Carolina. After construction was complete, the homeowner's association and the horizontal property regime for the development sued the general contractor, alleging that water intrusion had damaged the buildings and that the framing scope of work contributed to the water intrusion. The general contractor sued UFP, which in turn sued its lower-tier subcontractors. Selective Insurance Company insured one of the lower-tier subcontractors sued by UFP. UFP sued Selective, seeking defense and indemnity. Selective moved for summary judgment.

The dispute between UFP and Selective centered on the date when UFP tendered its defense to Selective as an additional insured. Selective contended that the tender did not occur until 2015, and Selective provided a defense from that date. However, UFP argued that the tender occurred six months earlier and that Selective should have provided a defense for that additional time. It offered as evidence a copy of an email sent to Selective attaching a tender letter. Selective countered with deposition testimony from UFP's corporate representative that he was not aware of any evidence that Selective had received the email. The court concluded that there was a genuine issue of material fact and denied Selective's motion for summary judgment.

Selective further argued that UFP was entitled only to damages to otherwise non-defective work caused by the work of Selective's insured, and that UFP could not produce evidence of such damages. Because Selective's insured worked on only 13 of the 59 buildings in the development, UFP would have to provide evidence of framing defects in the specific buildings Selective's insured framed. The court held that the evidence UFP offered, including expert testimony of damages caused by framing defects throughout the development and a theory that the total damages from the underlying litigation should be allocated in some fashion to each of the buildings, was sufficient to create an issue of fact and stave off summary judgment.

Finally, Selective argued that it was entitled to summary judgment on UFP's bad faith claim because additional insureds are not permitted to bring bad faith claims under South Carolina law. The court disagreed, holding that while South Carolina does not permit third parties to bring bad faith claims, additional insureds are not third parties merely because they are not named insureds. UFP sought benefits allegedly due to it under the contract as an additional insured, and it had standing to bring a bad faith claim.

Practice Point: An additional insured is not a third party to an insurance contract.

Oregon

Insured With SIR Provision Does Not Transform Into The Role Of Insurer

West Hills Development Co. v. Chartis Claims, Inc., 284 Or. App. 133 (2017)

West Hills Development Company sued its subcontractor's insurer, Oregon Automobile Insurance Company (OAIC), to recover costs from OAIC's refusal to defend West Hills in a construction defect action. West Hills was successful in its suit, and the trial court awarded attorney fees in addition to compensatory damages, pursuant to an Oregon statute allowing awards of attorney fees for prosecuting actions to recover defense costs from insurers. OAIC appealed the award of attorney fees.

On appeal, OAIC argued that West Hills was a self-insurer with respect to the case because, under a different policy, it had been required to pay a $25,000 self-insured retention, which practically amounted to a *pro rata* share of the total defense costs of approximately $231,000. As a result, according to OAIC, West Hills' claim was one for contribution among insurers, and the Oregon statute did not allow West Hills to recover attorney's fees. The court held that the self-insured retention provision of the other policy was irrelevant to OAIC's obligation to pay defense costs under its own policy. Paying a self-insured retention did not transform West Hills from an insured under OAIC's policy into an insurer. Therefore, the court upheld the award of attorney's fees.

> **Practice Point:** An SIR provision will not defeat a general contractor's claim for costs from a subcontractor's insurer under an Oregon statute which allows for the award of attorney fees for prosecuting actions to recover defense costs from insurers.

Colorado
Extrinsic Evidence Affecting Priority Of Coverage
Zurich American Ins. Co. v. *Acadia Ins. Co*., 243 F. Supp. 3d 1201 2017 U.S. Dist. LEXIS 39579 (D. Colo. Mar. 20, 2017)
Zurich American Ins. Co. and American Guarantee and Liability Insurance Company, who were the primary and excess insurers of Intrawest Stratton Development Corporation (ISDC) and DEW Construction Company (DEW), brought suit against a general contractor's insurer, Acadia Insurance Company, seeking reimbursement and/or contribution for defense and settlement costs incurred in an underlying construction defect case. The parties filed cross-motions for summary judgment.

In the underlying litigation, a condominium association brought suit against ISDC and DEW for defective construction. Both companies tendered the litigation to Zurich, and DEW also tendered the litigation to Acadia. Both Zurich and Acadia defended the underlying litigation under reservations of rights. When the Zurich policy was exhausted, American began defending DEW and ISDC pursuant to a reservation of rights. When the underlying litigation settled, Zurich and American demanded full reimbursement for the defense and settlement costs from Acadia, but Acadia refused.

Acadia argued that it had no duty to defend ISDC because its policy was excess over the Zurich and American policies pursuant to the "other insurance" provisions of each policy. The court held that the "other insurance" provisions of the Zurich policy were substantively similar to those of the Acadia policy, which made the provisions mutually repugnant. Ordinarily, that would mean both policies would contribute to the insureds' defense and indemnity on a *pro rata* basis. However, the Zurich policy had been exhausted on unrelated expenses before the Acadia policy came into play. That meant that the proper comparison was between the "other insurance" provisions of the Acadia policy and the American policy. The court held that while those provisions facially conflicted (which would have led to a pro rata application of the policies), extrinsic evidence, including the construction contract that established a Project Construction Insurance Program (PCIP) requirement for ISDC and the documents governing the PCIP program, dictated that the Acadia policy was excess over the American policy. Thus, assuming DEW was enrolled in the PCIP program, the Acadia policy was excess for both ISDC and DEW, and Acadia had no duty to indemnify Zurich or American.

If, on the other hand, DEW was not enrolled in the PCIP program, then Zurich and American had no obligation to defend or indemnify DEW. Their payments for DEW's defense and indemnity would then be merely voluntary, and Zurich and American would have no right to subrogate seeking

contribution or indemnity from Acadia. The court therefore denied Zurich and American's motions for summary judgment, granted Acadia's motion for summary judgment, and dismissed the suit with prejudice.

> **Practice Point:** While the "other insurance" provisions of two policies may appear to be mutually repugnant, a court may consider extrinsic evidence, including a construction contract that established a project construction insurance program (PCIP) requirement that dictate that one policy was intended to be excess to another policy.

California
Consolidation Of Actions For Limited Purpose May Not Establish Diversity For Federal Court Jurisdiction
Ironshore Specialty Ins. Co. v. Maison Reeves Homeowners Association, No. 17-CV-1704-AB (GJSx), U.S. Dist. LEXIS 61241 (C.D. Cal. Apr. 21, 2017)
In a procedural decision, the federal district court for the Central District of California remanded a coverage case stemming from construction defect litigation to the original state court. Following construction of a condominium development, the Maison Reeves Homeowners Association (HOA) sued the developer, various contractors, and subcontractors. Ironshore Specialty Insurance Company intervened as insurer for certain defendants. Ironshore also filed a separate coverage action, naming its insured and the HOA, among others, as defendants. The construction defect action and the coverage action were consolidated, but were later bifurcated on a motion by the HOA. The HOA then filed a motion for judgment on the pleadings in the coverage action, which was granted. Because the HOA was the last remaining California defendant in the coverage action, another defendant then removed the action to federal court. Ironshore filed a motion to remand.

The court held that, because the state court had consolidated the coverage action with other related actions, including the underlying construction defect action, the citizenship of the parties in all the consolidated litigation had to be considered. The court reasoned that the state court order consolidating the cases did not indicate that they were consolidated only for some limited purpose. Moreover, when the coverage action was removed to federal court, the state court dismissed all three state court actions without prejudice, and the underlying construction defect action was never reinstated. In any event, the state court record at least generated uncertainty over whether the diversity required for federal jurisdiction was present. In such circumstances, the court was bound to follow Ninth Circuit precedent requiring the case to be remanded to state court.

> **Practice Point:** A federal court considering diversity of the parties must consider the citizenship of the parties in all consolidated actions unless the court order consolidating the cases indicates that the cases were only consolidated for some limited purpose.

New Jersey
Claim Preclusion
AJD Constr. Co., Inc. v. Crum & Forster Specialty Ins. Co., No. A-1715-15T1, 2017 N.J. Super. Unpub. LEXIS 1034 (Super. Ct. App. Div. Apr. 28, 2017)
Port Liberte filed three lawsuits in 2008 against multiple defendants in Hudson County Superior Court. AJD, which was the general contractor, was a named defendant. AJD was insured by Crum & Forster, Arrowood Indemnity Co., and Assurance Co. of America. Crum & Forster disclaimed coverage, with Arrowood assuming AJD's defense under a reservation of rights. Two years later, Arrowood filed a declaratory judgment action seeking contribution from Crum & Forster for defense costs. Arrowood

also named Assurance and AJD as defendants. In 2011, the court held that the Crum & Forster Policy did not provide coverage for faulty workmanship.

In 2013, AJD filed a declaratory judgment action against Crum & Forster and others concerning three other unrelated construction defect lawsuits for which Crum & Forster had denied coverage. In 2014, that court held that Crum & Forster did have a duty to defend AJD because these suits involved consequential property damage caused by AJD's subcontractors. In response, the contractor moved to amend its complaint to include the Port Liberte actions, but the motion was denied because there was "no plausible explanation" for failing to include Port Liberte in the contractor's original complaint. Port Liberte then intervened and filed an answer and cross claim seeking a declaration that Crum & Forster had a duty to indemnify AJD in connection with any judgment or settlement reached, specifically as the three Port Liberte suits had settled in 2014. In 2015, the court ruled that preclusion did not apply because Port Liberte was not involved in the Arrowood suit.

With regard to the instant appeal, the contractor in September 2014 filed another declaratory judgment suit against Crum & Forster in Monmouth County claiming its denial of coverage constituted breach of contract. Crum & Forster successfully moved to dismiss the action based upon claim preclusion and the entire controversy doctrine. In March 2016, Port Liberte filed another declaratory judgment action seeking a judicial declaration that Crum & Forster was required to pay for damages attributable to AJD's negligence that were in excess of the settlement amount that AJD contributed to in the resolution of the Port Liberte actions.

The Court denied Crum & Forster's motion to dismiss this suit, finding that Port Liberte had standing as it only sought a declaration of coverage responsibilities, not monetary damages. On appeal, the New Jersey Appellate Division found that Port Liberte had no standing to file its own separate suit to compel Crum & Forster to indemnify AJD, because these claims could have been previously made. "Any other resolution would defeat the goals of the entire controversy doctrine — judicial administration and fairness to litigants. The doctrine recognizes that it is neither fair nor efficient to fragment a single controversy into separate actions as such fragmentation can harass litigants, delay final adjudication, and waste judicial resources."

> **Practice Point:** Under the entire controversy doctrine, it is neither fair nor efficient to fragment a single controversy into separate actions as such fragmentation can harass litigants, delay final adjudication, and waste judicial resources. All claims and allegations should be made in a single lawsuit, rather than separate declaratory judgment actions.