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NEW TEXAS COVERAGE CASE ALERT—SEPTEMBER 2, 2010

Construction Defect Decision Defines "Product" Very Broadly—Implications For Broad Interpretation Of "Insured Product" Exclusion?

You might be interested in a new construction defect decision, with some significant potential coverage implications favorable to carriers, just issued by the Texas Supreme Court on August 20, 2010, *Fresh Coat, Inc. v. K-2, Inc.,* ___S.W.3d ___, 2010 WL 3277130 (Tex. 2010). In a nutshell, the case holds that EIFS siding that a contractor purchased from the manufacturer and then installed on a home using its own labor, services and expertise, was a "product" for purposes of the contractor's statutory indemnity claim against the manufacturer under the "innocent retailer" doctrine. **Obviously, from a coverage standpoint, if Texas courts apply this same rationale under the CGL policy's "your product" exclusion (exclusion k), then many aspects of an insured contractor's "work" could potentially be reclassified as the insured's "product" so as to fall within the "insured's product" exclusion which does not have the same exceptions as the "insured's work" exclusion (*i.e.,* only applicable to "completed" work and not applicable to work of the insured's sub).**

In this connection, the court classified the EIFS exterior as the contractor's "product," notwithstanding that to install EIFS, the contractor has to assemble and apply it to the home exterior and it ultimately becomes part of the realty, losing most of the attributes of a typical "good." The court, however, applied a common sense, plain meaning of the word "product" and held that the **installed EIFS was a "product."** If courts now take the same approach in interpreting the scope of the "insured's product" exclusion under the CGL policy, the "insured's product" exclusion may be found to apply to such things as **leaky windows, defective siding, Chinese Drywall, a leaky roofing system, etc.,** even though such "products" purchased by the installing contractor require the addition of the contractor's labor, services and expertise to become part of the structure. Such a broad interpretation of what constitutes a "product" could mean that carriers, in evaluating coverage in construction defect cases, now need to not only focus on the "insured's work" exclusion, with its several significant exceptions, but also consider the possibility that the "insured's product" exclusion, which has no exceptions, may apply.

Of course, *Fair Coat* was not a coverage case and only addressed what a "product" is under the Texas product liability indemnity statute; so whether this holding and its reasoning will ultimately be exported into the coverage arena in subsequent cases remains to be seen.

If you have questions about this case or its implications to a specific matter, please do not hesitate to contact Schubert & Evans, P.C. at 214-744-4400.