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MEMORANDUM

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**Ninth Circuit Holds That Substandard Construction Absent Intentional Breach
Constitutes An “Occurrence” Under Washington Law**

In October 2006, the trial court issued its order in *Mid-Continent Casualty Co. v. Williamsburg Condominium Association* (unpublished opinion), holding that defective construction is not an “occurrence” triggering coverage under a CGL policy. Recently, the Ninth Circuit Court of Appeals overturned this decision to hold that it is.

Williamsburg arose when the Williamsburg Condominium Association (the “HOA”) sued the developer of the project for defective construction, breach of Washington’s Condominium Act, and other claims. In turn, the developer sued the general contractor, Titan, and Titan tendered defense and indemnity to its insurance company, Mid-Continent Casualty Company. The matter settled, and Mid-Continent filed a declaratory action in federal court seeking a determination of the parties’ rights and responsibilities with respect to funding of the settlement. Mid-Continent argued that there was no coverage under its policy because the defective construction was not an “occurrence” as defined in the policy. The trial court agreed, holding that the defective construction was not an “occurrence” under Washington law.

The Ninth Circuit overturned the decision and, making short shrift of the trial court’s opinion, simply held that, “[a]bsent any allegation that the substandard construction in this case resulted from an intentional breach of contract by [the insured contractor], we conclude that the negligent construction of the Williamsburg project that resulted in breach of contract and breach of warranty claims constituted an ‘occurrence.’”

The Ninth Circuit based its reasoning on language from a 1980 case addressing an “occurrence,” where the Washington Supreme Court held that an “occurrence” includes the “deliberate manufacture of a product which inadvertently is mismanufactured.” *Yakima Cement Products Co. v. Great American Insurance Co.* Thus, the Ninth Circuit reaffirmed Washington’s rule that defective construction constitutes an “occurrence” triggering coverage under a commercial general liability policy.