

Continuous and Progressive Damage Raised Factual Question as to the Timing of “Occurrence”

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Thomas Guastello v. AIG Specialty Insurance Company, — Cal.Rptr.3d —, 2021 WL 650878 (Cal. Ct. App., Feb. 19, 2021), Fourth Appellate District Court of Appeal, Case No. G057714.

Various stakeholders in the Pointe Monarch housing development in Dana Point, California, accused subcontractor C.W. Poss Inc. (“Poss”) of negligently designing and constructing retaining walls. One such party, Thomas Guastello, sued Poss for damage to a perimeter wall in the backyard of Guastello’s property. According to Guastello, in January 2010, a retaining wall close to his property designed and constructed by Poss failed and caused soil to collapse and damage a perimeter wall on Guastello’s property.

Poss’ liability insurer, AIG Specialty Insurance Company (“AIG”), disclaimed a duty to defend or indemnify Poss against Guastello’s suit. AIG concluded that Guastello’s alleged property damage occurred in 2010 – many years after the 2003-2004 coverage period of Poss’ general liability insurance policy. AIG’s policy offered occurrence-based coverage, meaning that it covered certain damages that occurred during its policy period.

Guastello obtained a default judgment against Poss in excess of \$700,000. He then sued AIG asserting claims as a judgment creditor under Insurance Code section 11580. The trial court granted AIG’s motion for summary judgment, finding that Guastello’s property damage occurred “well past the expiration of the policy.”

The Court of Appeal reversed. As a threshold matter, the Court of Appeal agreed with the trial court that Guastello could not pursue a direct action against AIG based on AIG’s alleged failure to defend Poss. As the Court noted, a third party lacks standing to assert a claim that an insurer owed and breached a duty to defend its insured. Nevertheless, the Court found that triable issues of fact regarding the timing of the property damage to Guastello’s property negated summary judgment.

In so holding, the Court recounted that “[a]n ‘occurrence’ policy provides coverage for damages that occur during the policy period, even if the claim is made after the policy has expired,” and that “it is well established that the time of the relevant ‘occurrence’ or ‘accident’ is not when the wrongful act was committed but when the complaining party was actually damaged.” Quoting *Whittaker Corp. v. Allianz Underwriters, Inc.*, 11 Cal.App.4th 1236, 1241 (1992).

According to the Court, Guastello submitted evidence in opposition to AIG's motion supporting that damage to his property began during the 2003-2004 policy period. More specifically, Guastello submitted a declaration from a civil engineer opining that Poss' negligent construction of the retaining wall led to damage to the retaining wall itself and to the surrounding property, including Guastello's property. The engineer opined that, while Poss' retaining wall failed completely in 2010, there had been continuous and progressive destabilization and damage to Guastello's property since 2003. These facts and allegations led the Court to conclude that Guastello had raised a triable issue of material fact as to when the "occurrence" took place, and thus, the timing or triggering of AIG's coverage under Poss' liability insurance policy.

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