MEALEY'S™ LITIGATION REPORT

Construction Defects Insurance

Construction Defect Claims: A 2022 Update Part I

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A commentary article reprinted from the January 2023 issue of Mealey's Litigation Report: Construction Defects Insurance

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Commentary

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[Editor's Note: Thomas F. Segalla, Michael T. Glascott, Ashlyn M. Capote, Adam R. Durst and Sean P. Hvisdas are partners and Samantha M. McDermott is an associate at Goldberg Segalla LLP. Any commentary or opinions do not reflect the opinions of Goldberg Segalla LLP or LexisNexis®, Mealey Publications™. *Responses are welcome.]*

Introduction

This summary of construction-defect coverage litigation includes a broad range of coverage issues. Cases include fact-specific discussions that note the insured's scope of work, and allegations against each insured. The courts' analyses frequently evaluate allegations against the insured along with the duty to defend standard at issue. For example, in several Texas cases discussed below, the decisions were the direct result of the courts' application of the eight-corners rule with regard to duty to defend.

In Part I of this publication, the authors discuss insurance coverage construction-defect cases from the first half of 2022. The authors look forward to following the updates on this aspect of insurance coverage law, as well as various others in Part II, which will discuss the nationwide insurance coverage cases from the latter half of 2022.

California

1. *Travelers Prop. Cas. Co. of Am. v. Old Country Millwork*, 2022 U.S. Dist. LEXIS 119967, 2022 WL 2285656 (C.D. Cal. Feb. 28, 2022).

Insured Not Entitled to Stay in Coverage Litigation Related to Underlying Construction-Defect Suit

A homeowner contracted with a roofing contractor to install a roof at its premises. The roofing contractor then contracted with the insured, a distributor, to obtain certain roofing materials from a manufacturer. Several years after the roof was installed, the homeowner alleged that the roof's protective coating became discolored and turned 'an unsightly milky white…causing damage" to the roof. The homeowner sued the roofing contractor, who in turn brought a cross-complaint against the insured, alleging the insured was responsible for any damages allegedly sustained by the homeowner as a result of their negligence. The insured tendered coverage for the cross-complaint to its general liability insurer, which agreed to defend the insured subject to a reservation of rights. The insurer then commenced a declaratory judgment action seeking a declaration of no coverage.

The insured moved to stay the coverage action on the basis that the coverage action turned on facts to be litigated in the underlying action. In particular, the insured argued that there were disputed factual

issues about the services and materials it provided to the roofing contractor, as well as issues regarding its potential liability for negligence or a defective product. The insurer argued these facts were immaterial to the coverage litigation because the business risk exclusions (e.g., j.1, j.5, j.6, or k.) applied, regardless of how the disputed facts were resolved. The insured also failed to provide any facts extrinsic to the complaint in the underlying action to show a dispute. As a result, without going so far as to rule on the merits of the insurer's claims, the court denied the insured's motion for a stay.

Colorado

1. *Curtis Park Group v. Allied World Specialty Ins. Co.*, 2022 U.S. Dist. LEXIS 26110, 2022 WL 444375 (D. Colo. Feb. 14, 2022).

Determining Cause of Damage Was Necessary to Apply Construction-Defect Exclusion

An insurer sought to enforce its construction-defect exclusion against its insured in connection with an underlying claim where the insured installed podium slabs that were defective. The court denied the insured summary judgment on the basis that there were disputed facts regarding what caused the damages within the podium slabs. On a motion for reconsideration, the insurer argued the court improperly limited its analysis to loss or damage "caused by" the subject defect, ignoring the language in the exclusion that also bars coverage for damage "result[ing] from" the excluded causes. The court disagreed and held that the subject exclusion necessitated a determination of the cause of the damage to determine what the damage "results from" or "relates to."

2. *Lodge at Mt. Vill. Owner Ass'n. Inc. v. Eighteen Certain Underwriters of Lloyd's of London*, 2022 U.S. Dist. LEXIS 48883, 2022 WL 824435 (D. Colo. Mar. 18, 2022).

Damage from Defective Workmanship Not Covered Under First-Party Property Policy

The insured owned several multi-unit condominium buildings with log siding that required upkeep in the form of a sealant, called "chinking," in the joints between the logs. In 2006, the insured retained contractors to perform this maintenance, which was performed again in 2014. The maintenance performed in 2014 was allegedly defective. A dispute arose between the insured and the contractor that performed the 2014 work, which was subsequently settled with a full and final release of all claims in connection with the construction defects.

In 2017, the insured then filed a claim with its first-party property insurer for damages associated with the "[e]valuation and assessment of log finish and chinking" at the property. The insurer denied coverage on the basis that the policy did not provide coverage for the damage caused by the faulty workmanship and construction defects. The insurer also denied coverage because it said that the policy did not provide coverage for ordinary wear and tear or gradual deterioration, and because the insured failed to comply with the policy's notice provisions. As the alleged loss was deemed to exclusively be caused by the 2014 contractor's failure to properly seal the wood logs (or at best, the gradual deterioration and wear of the property), the court concluded that coverage was excluded. The court also held that the insured failed to notify its insurer within a reasonable time after receiving notice of its claimed loss, which was in breach of the policy's notice provisions.

Connecticut

1. *Cnty. Wide Mech. Servs., LLC v. Regent Ins. Co.*, 3:20-CV-1135 (SVN), 2022 U.S. Dist. LEXIS 86726 (D. Conn. May 13, 2022).

In this case, the insured was sued in an underlying lawsuit alleging that it improperly installed an HVAC system. Its CGL insurer asserted that the policy did not cover defense of the underlying action because the insured was being sued for its own faulty work, which did not constitute an occurrence. When the insured filed this action, the insurer agreed to defend the insured in the underlying action subject to a reservation of rights. The insurer then moved for judgment on the pleadings in the declaratory judgment action.

The insurer had argued that the underlying action only sought damages as a result of a faulty HVAC system that the insured had installed and did not seek damages for anything other than the insured's work product, i.e., there was no occurrence. The court disagreed and determined that general references to damages suffered in the underlying action "plausibly

suggest[ed]" that there was damage to property outside the HVAC system.

The court also rejected the insurer's position that the Contractual Liability Exclusion barred coverage, finding the exclusion ambiguous regarding whether it applied to breach of contract claims, i.e., claims for the insured's own contractual liability. The court also declined to dismiss the insured's bad faith claim because dismissal was sought based on the fact that the insurer had been defending its insured, but the court explained that it was possible that the initial denial to defend could be deemed bad faith.

Florida

1. *Pro-Tech Caulking & Waterproofing, Inc. v. Tig Ins. Co.*, No. 21-80185-CIV, 2022 U.S. Dist. LEXIS 12319 (S.D. Fla. Jan 19, 2022).

The insured was a waterproofing subcontractor responsible for, inter alia, installing waterproofing material onto a garage floor in a condominium building in about 2007. In about 2014, the insured was sued in connection with its work. The insured sought coverage from its CGL insurer that had issued policies effective between 2012-2014. The insurer denied coverage based on, inter alia, the fact that the insured's allegedly faulty work occurred prior to when its policies incepted and based on a Prior Occurrence and Pre-Existing Damage Exclusion.

The court ultimately agreed and dismissed the complaint against the insurer. It concluded that a policyholder's defective work can constitute an occurrence under Florida law, but because there was no dispute that the insured's work was fully performed prior to January 6, 2012, the start of the first policy period, there was no occurrence during the policy period. Further, the court explained that even if coverage had been triggered, it would be excluded by the Prior Occurrence and Pre-Existing Damage Exclusion.

2. *Southern-Owners Ins. Co. v. Phoenix Realty Homes, Inc.*, Case No: 5:20-cv-384-JSM-PRL, 2022 U.S. Dist. LEXIS 132089 (M.D. Fla. Jan. 20, 2022).

The insured was a home developer that was sued in connection with an allegedly defective construction of a home. The insured's CGL insurer denied coverage because it claimed that the lawsuit against the insured only sought damages as a result of the insured's faulty work and relied upon the policy's Damage To Property Exclusion. Subparts of that exclusion applied to "[t]hat particular part of real property on which any insured or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations" and "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The insurer also relied upon a Damage To Your Work Exclusion, which applied to "'property damage' to 'your work' arising out of it, or any part of it, and included in the 'products-completed operations hazard.'"

Initially, the court concluded that it was possible the underlying complaint alleged damages to work other than the insured's work product, which could be construed as "property damage" as defined by the policy. The court also concluded that the exclusions did not vitiate the duty to defend because it was unclear exactly what role the insured's actions were with respect to the damage. The court also explained that if one or more exclusions might apply to some portion of the alleged damages, the insurer had not demonstrated that all of the damages were indisputably within the scope of any of the exclusions.

Hawaii

1. *St. Paul Fire & Marine Ins. Co. v. Bodell Constr. Co.*, 20-cv-00288-DKW-WRP, 2022 U.S. Dist. LEXIS 79379 (D. Haw. May 2, 2022).

The insured, a general contractor, was sued by a developer after a condominium project allegedly failed to comply with building codes. The insured sought coverage under multiple CGL policies, but the insurers asserted there was no coverage for the underlying dispute because there was no "occurrence" alleged.

This action involved interpretation of multiple policies, some of which had the standard definition of "occurrence," which is an "accident including continuous or repeated exposure to substantially the same general harmful conditions." Other policies included an endorsement that amended the "occurrence" definition to include "[a]n act or omission, including all related acts or omissions, that causes 'subcontracted work property damage.'"

The court concluded that for policies with the standard definition of "occurrence," there was no coverage. However, for the other policies, the court denied the insurers' motion for summary judgment because it was possible that the underlying lawsuit alleged damages to subcontracted work.

Illinois

1. *Korte & Luitjohan Contrs., Inc. v. Erie Ins. Exch.*, No. 5-21-0254, 2022 IL App (5th) 210254 (Ill. App. 5d Mar. 4, 2022).

The insured was hired to install elevators in a building and was sued when the elevators allegedly failed to work. The insured's CGL insurer denied coverage because, inter alia, there was no "occurrence" alleged. In a suit brought by the insured against the CGL insurer, the trial court granted summary judgment to the insurer and agreed that, because the underlying lawsuit did not allege damage to anything other than the elevators, no occurrence was alleged. The appellate court agreed with the trial court's analysis.

2. *Ohio Sec. Ins. Co. v. Power Clean*, No. 20C6878, 2022 U.S. Dist. LEXIS 12185, (N. D. Ill. Jan.24, 2022).

The insured was sued after it allegedly failed to properly apply sealant on sidewalks. Its CGL insurer denied coverage because the alleged damage was to the insured's work product so there was no "occurrence." The insurer filed this action seeking a determination that no coverage was owed and ultimately moved for summary judgment. The court concluded that the insurer had an obligation to defend its insured because there were allegations in the underlying action that the damage exceeded the scope of the insured's work. Specifically, the allegation was that the sidewalk had been physically damaged, which the court said was outside of the insured's work product because the insured had only been hired to clean and seal the sidewalks, not to install them.

Maryland

1. *Bayside Fire Prot., LLC v. Everest Indem. Ins. Co.*, No.: GJH-20-2794, 2022 U.S. Dist. LEXIS 50309 (D. Md. Mar. 21, 2022).

The insured was sued in an underlying action alleging the insured breached its duty of care by not installing fire alarm systems properly. The insured demanded that the insurer defend and indemnify it under its CGL policy. The insurer refused, and this lawsuit followed. The CGL policy contained an E&O Endorsement, which provided coverage for a "'loss' that results from a negligent act, error, or omission." The initial coverage was whether there was a "loss" alleged as defined in the E&O Endorsement, and the court ultimately concluded that there was – at least for the purposes of triggering the insurer's obligation to defend its insured.

The policy also contained exclusions under subparts 'a' (Expected or Intended Injury Exclusion), 'k' (Your Product Exclusion), 'l' (Your Work Exclusion), and 'm' (Impaired Property Exclusion). The court explained that the "critical inquiry" in determining whether the Your Work Exclusion or Your Product Exclusion apply is whether damage to something other than the insured's own "product" or "work" has been alleged. Because the lawsuit alleged that the insured's failure to install the fire system and general poor workmanship devalued the condominium and its condition, then there was damage to more than just the insured's work product alleged. Thus, the exclusions did not bar coverage.

With respect to the Expected or Intended Injury Exclusion, the court concluded that it operated to partially bar coverage. In other words, there would be no coverage for damages resulting from failure to comply with the contract because those are foreseen, but there would be coverage for indirect damages, such as injury to third-party property.

The majority of the court's analysis was with respect to the intended interplay between the Impaired Property Exclusion and the E&O Endorsement. The court explained, "The CGL Policy excludes 'expected or intended injury,' damage to 'your product' or 'your work,' and damage to 'impaired property' or 'property not physically injured' because of a 'defect' in 'your product' or 'your work.' Applying these exclusions, it is difficult to conceive of a scenario in which there is a 'loss' from a 'negligent act' that Bayside is 'legally obligated' to pay that is not excluded." Ultimately, the court concluded that regardless of how it construed the exclusion's application to the E&O Endorsement, the insurer had an obligation to defend because the coverage provided by the endorsement was ambiguous.

Massachusetts

1. *Admiral Ins. Co. v. Tocci Bldg. Corp.*, No. 21-10388-PBS, 2022 U.S. Dist. LEXIS 55096 (D. Mass. Mar. 28, 2022).

The insured was hired as the general contractor for three separate construction projects. In one, a suit was filed against the insured alleging poor workmanship, failure to supervise, and failure to meet deadlines. The insured learned of the suit in 2016, but did not notify its insurer until January 2020. The insurer sought a declaratory judgment that it owed no duty to defend the insured under the CGL policy it issued.

The insurer denied coverage because the allegations did not allege liability caused by an occurrence and even if it did, the Damage To Property Exclusion under j(5) would apply. The insurer argued the suit was about the quality of the insured's work product, and this is not the type of risk CGL policies insure against. The court agreed that there was no occurrence, or accident, alleged and emphasized how CGL coverage is to protect against tort liability for physical damages, not for contractual liability of the insured for economic loss because the work product was subpar. The insured argued that even if the lawsuits against it were because of poor workmanship, there should be coverage because one subcontractor's actions led to damage to other portions of the project. In other words, the insured took the position that damages that were the result of a subcontractor's work meant that they were the result of an occurrence. The court disagreed, reasoning that, as general contractor, the insured was responsible for ensuring all project work was done to a high quality, even if the subcontractors did it.

Because it determined that coverage was not triggered in the first instance, the court did not reach the question of whether the Damage To Property Exclusion applied, but remarked that there was strong support for the insurer's position that business risk exclusions applied.

Nevada

1. *Global Sterilization & Fumigation v. Admiral Ins. Co.*, 3:20-cv-00444-LRH-CSD, 2022 U.S. Dist. LEXIS 104697 (D. Nev. May 4, 2022).

The insured allegedly damaged the agricultural product while performing work for a client, and was sued for negligence, fraud, and breach of contract. The insured then sought a defense from its CGL insurer, but the insurer argued it did not have a duty to defend because there was no "occurrence," and even if there was, it was excluded under (1) Exclusion j(4), which excluded coverage for property in the care, custody, or control of the insured; (2) Exclusion j(5), which excluded coverage for "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it"; and (3) Exclusion j(6), which excluded coverage for "'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'"

The court granted the insured's summary judgment motion, concluding that there was no occurrence alleged. Citing Nevada precedent, the court concluded that the customer's suit sought damages for the insured's normal business risks, which are outside the coverage of a CGL policy. The court also concluded that even if coverage were triggered in the first instance, then the various business risk exclusions relied upon by the insurer would also bar coverage.

New Mexico

1. *OR&L Constr., L.P. v. Mt. States Mut. Cas. Co.*, 514 P.3d 40 (N.M. Ct. App. 2022).

The insured, a roofer, submitted a claim to its CGL insurer after a fire occurred at a home where the roofer performed "torch-down" roofing, a technique that uses a flaming torch to heat and seal tar paper onto a roof. The insurer disclaimed coverage based on a Designated Work Exclusion and Designated Ongoing Operations Exclusion, which barred coverage for torch-down roofing techniques, and this lawsuit followed. There were questions about procurement of coverage because the insured claimed it was told by its broker the policy would cover all roofing operations but, ultimately, the court concluded the exclusions were unambiguous and barred coverage.

New York

1. *Suez Treatment Sols., Inc. v. ACE Am. Ins. Co.*, 2022 U.S. Dist. LEXIS 59044, 2022 WL 954601 (S.D.N.Y. Mar. 30, 2022).

Court Focuses on Allegations in Complaint in Assessing Duty to Defend Construction Defect Claim

The insured was engaged in the development of a pollution treatment system in North Carolina. The project ultimately failed, and the insured was sued for damages based on, among other things, its alleged breach of contract and negligence. The insured then sought coverage in connection with the underlying action from two separate insurers, one that issued a "Contractors Pollution Liability and Errors & Omission Insurance Policy" (the "E&O Policy") and the other that issued a "Commercial General Liability" policy (the "CGL Policy"). Both insurers denied any obligations in connection with the claim, and coverage litigation ensued.

In the coverage litigation, the court determined that the insurer that issued the E&O policy was obligated to provide the insured with a defense in connection with the underlying action, holding that the insurer failed to establish that the Products Liability Exclusion applied. The court explained that because the complaint included allegations of causes of the damages that did not fall within the scope of that exclusion, it was unclear whether the allegations in the complaint fell squarely within the exclusion.

As to the CGL Policy, the court held that the complaint included allegations of damage to third-party property, beyond the property that the insured itself supplied, and thus included allegations of "property damage" caused by an "occurrence." The court also concluded that the alleged damages were not otherwise excluded under the policy's business risk exclusions, expected or intended exclusion, pollution exclusion, or professional liability exclusion, thus triggering a defense obligation under that policy, as well.

2. *Western Waterproofing Co. v. Zurich Am. Ins. Co.*, 2022 U.S. Dist. LEXIS 20083, 2022 WL 329225 (S.D.N.Y. Feb. 3, 2022).

Expanded Business-Risk Exclusion and Employer-Liability Exclusion Bar Coverage For Construction Accident

An owner and construction manager of a construction project sued the insured, a waterproofing company, for damages the insured had allegedly caused to a construction project and resulting bodily injuries. In particular, the insured was using a "Minipicker" to lift façade panels into place at the project when the "Minipicker" tipped over and caused damage to certain property, and injured two of the insured's employees at the project. The owner and construction manager claimed the insured's acts "set into motion a chain of events" that resulted in the accident, and thus damage to the project and workers. The owner and construction manager sued the insured for all damages resulting from the accident based on theories of breach of contract, negligence, and gross negligence.

The insured commenced this action seeking a defense from several of its general liability insurers, who disclaimed coverage on the basis the underlying complaint did not allege an "occurrence," as was required for coverage to be triggered. The insurers argued, in the alternative, that even if an "occurrence" were alleged, coverage was barred by the contractual liability exclusion, business risk exclusions, and an employer liability exclusion. The court sided with the insurer, finding no duty to defend. The court concluded the underlying complaint alleged damages caused by an "occurrence" because the insured's faulty work caused damage to parts of the project that did not involve the insured's work, even resulting in "loss of use" of the project.

The court also found the underlying complaint alleged damages sustained by the owner and construction manager because of bodily injury sustained by the injured workers. However, the court concluded that the business-risk exclusions – and particularly exclusion j.5, which was modified by endorsement to bar coverage for damage to "[a]ny part of any 'designated project'…if such 'property damage' occurs during the course of construction" – barred coverage for the claims for property damage, and the Employer Liability Exclusion barred coverage for the claims for bodily injury. As such, the court determined the general liability insurers owed no duty to defend or indemnify the insured.

Notably, the court also concluded the insured's insurer that provided coverage for the insured's "professional services" also did not owe a duty to defend.

North Dakota

1. *Pavlicek v. Am. Steel Sys.*, 970 N.W.2d 171 (N.D. 2022).

An individual hired a contractor to construct a steel building, and the insured was hired to install the

concrete floor and floor drain. The individual claimed that the insured had failed to properly install the floor and ultimately obtained a judgment against the insured. The individual then sought to collect the judgment from the insured's CGL insurer.

The CGL insurer asserted that there was no coverage for the judgment against the insured because the judgment was for the concrete floor, the insured's own work product, and therefore, there was no occurrence. The insurer also argued that even if coverage had been triggered, various exclusions applied, including the Damage To Your Work Exclusion.

The lower court concluded the insured's faulty workmanship caused the damage to the concrete floor and in-floor heating system, and that the CGL policy did not cover the damage because that was the insured's work. The lower court also concluded that because replacement of the floor was the only way to fix the drain, it was covered. The appellate court reversed the determination that coverage was owed for the floor since that was the insured's own work product.

Ohio

1. *Motorists Mut. Ins. Co. v. Ironics, Inc.*, No. 2020-0306, 2022 Ohio LEXIS 573 (Ohio Mar. 23, 2022).

The insured was sued when it sold allegedly defective tube scales to a customer. The insured sought coverage under its CGL and umbrella policies, but the insurer filed this lawsuit arguing that no coverage was owed. The trial court had granted summary judgment to the insurer, and the court of appeals determined that no coverage was owed under the CGL policy, but that coverage was owed under the umbrella policy.

The primary question before the Ohio Supreme Court was whether the incorporation of a defective ingredient into an integrated product constitutes "property damage" resulting from an "occurrence." Initially, the court rejected the insurer's argument that "property damage" must be to a product other than the insured's own work product explaining that "[n]othing in the term itself or in the term's definition in the policy indicates that damage to a multicomponent product is to be regarded as damage to the insured's product."

With respect to the "occurrence" issue, the court analyzed extra-jurisdictional cases involving the incorporation of a faulty component into the insured's work product, and concluded that the damage was the result of an "occurrence" because the "provision of contaminated tube scale resulted in property damage that was neither expected nor intended from the standpoint of the insured."

Pennsylvania

1. *Am. Home Assur. Co. v. Superior Well Servs.*, 586 F. Supp. 3d 365 (W.D. Pa. 2022).

The insurer sought a declaratory judgment regarding its duty to indemnify the insured related to claims brought by the owners of several gas wells. The insured provided gas-well servicing on the owner's gas wells in New York from 2005 to 2007, and allegedly damaged the owner's wells. The underlying court had dismissed the negligence count against the insured because the court found that the owner "failed to present any evidence establishing that [the insured] owed [the owner] a legal duty independent of the contract." It also dismissed a claim for negligent intention. The jury returned a verdict in favor of the owner, finding the insured failed to perform its contract in a workmanlike manner. The insurer denied coverage based on the jury verdict.

The court analyzed the policy's Underground Resources and Equipment Coverage ("UREC") Endorsement, which added coverage for "'property damage,' included within the 'Underground resources and equipment hazard' arising out of the operations performed by you or on your behalf…" The insurer argued that, because the UREC Endorsement did not contain a separate insuring agreement, the policy did not extend coverage in the absence of an occurrence, which breach of contract could not be. The court disagreed, observing that the purpose of the UREC Endorsement was to bring equipment, such as the wells, within the scope of coverage if the damage to those wells arose out of the insured's operations. The court found that, based on the jury's findings, the damage to the gas wells fell within the scope of the UERC Endorsement and triggered the insurer's duty to indemnify the insured.

2. *Main St. Am. Assur. Co. v. Connolly Contrs., Inc.*, 587 F. Supp. 3d 256 (E.D. Pa. 2022).

The insurer issued several business owners policies to a subcontractor that had been hired by a general

contractor in connection with the development of several houses. The insurer denied coverage to both the subcontractor, and the general contractor, because the underlying litigation did not allege an "occurrence" because they were standard construction defect actions. The insurer also argued that the general contractor was not entitled to insured status. The court agreed that there was no coverage because there was no "occurrence." The court analyzed the specific claims being made against the general contractor and subcontractor, and concluded that because the alleged damage was the project itself, coverage was not triggered.

3. *Main St. Am. Assur. Co. v. Howard Lynch Plastering, Inc.*, 585 F. Supp. 3d 737 (E.D. Pa. 2022).

The insured, and a putative additional insured, sought coverage for several lawsuits and arbitrations involving multiple properties arising from alleged construction defects that caused property damage. The insurer filed suit in the Eastern District of Pennsylvania for declaratory judgment. The insurer argued that the underlying litigation alleged faulty workmanship, which lacks the fortuity to constitute an "occurrence" under Pennsylvania law. The insureds contended that the underlying actions, though alleging faulty workmanship, also included allegations of products liability that caused property damage, which could be an occurrence. The trial court disagreed and distinguished the allegations in the underlying litigation from a line of cases, including a Third Circuit Court of Appeals Case, *Nautilus Ins. Co v. 200 Christian St. Partners LLC*, 819 F. App'x 87 (3d Cir. 2020), which had concluded that product defects that cause property damage could be an occurrence.

The insureds also argued that the policy must cover faulty workmanship because the "products-completed operations hazard" excludes property damage because "your work" was improperly performed on it, but that exclusion does not apply to property damage included in the products-completed operations hazard. The court rejected this argument because, regardless of the language in the exclusion, faulty workmanship is not an occurrence and, therefore, allegations of faulty workmanship fail to satisfy a threshold requirement of coverage.

South Carolina

1. *Lendlease US Constr. Inc. v. CNA Ins. Group, Nationwide Ins. Co.*, No. 4:19-cv-00959-JD, 2022 U.S. Dist. LEXIS 116466 (D.S.C. June 24, 2022).

The insured, a general contractor, was alleged to have negligently constructed three units at a mixed-use development consisting of seven buildings in 2008. A "Manifestation Endorsement" on the subcontractor's policy, on which the general contractor was an additional insured, changed the insuring agreement to state, among other changes, that the insurance applies to "property damage" only if, inter alia, the "property damage" first "manifests" during the policy period.

The property owner sued the general contractor, alleging that faulty exterior envelope construction caused water intrusion and associated damages, which it alleged it discovered following its purchase of the property after 2011. The general contractor joined the subcontractor to the underlying action.

The insurer moved for summary judgment, contending that no property damage occurred during the policy period and the Manifestation Endorsement precluded coverage. The court agreed. Because the underlying complaint narrowed the timing of any potential property damage until after the policy period, there was no property damage alleged during the policy period. The court also found that there was no evidence to support manifestation of property damage during the policy period, as required by the Manifestation Endorsement.

2. *Trehel Corp. v. Natl. Fire & Mar. Ins. Co.*, No. 8:21-cv-01962-DCC, 2022 U.S. Dist. LEXIS 45658 (D.S.C. Mar. 15, 2022).

A general contractor filed suit against its subcontractor's insurers, contending that those insurers owed coverage to the general contractor for underlying construction-defect litigation. One of the insurers moved to dismiss the complaint pursuant to FRCP 12(b)(6). The insurer argued that the general contractor was not an additional insured because the additional insured endorsement only applied to ongoing operations, and coverage was sought under a policy period in effect several years after the construction completed. The insurer also contended that because the subcontract was not signed by the insured, it did not qualify as an insured contract under the policy.

Initially, the court agreed that the general contractor was not entitled to additional insured status under the

policy. However, the court concluded that there was a question of fact regarding whether the general contractor was a contractual indemnitee. The court found that the insured sufficiently executed the subcontract through performing by conducting its work on the construction project. Further, the court observed that the general contractor had executed the subcontract even if the insurer had not, which distinguished this situation from the case that the insurer was relying upon. Therefore, the court denied that portion of the insurer's motion based on insured contract.

Tennessee

1. *Owners Ins. Co. v. KW Real Estate Ventures*, No. 2:19-cv-02581-MSN-cgc, 2022 U.S. Dist. LEXIS 55296 (W.D. Tenn. Mar. 28, 2022).

The insured, a developer, retained a subcontractor to perform foundation work on a multi-unit property. Construction began in the mid-2000s and was completed in 2016 at which time the individual units were sold. After the sale, unit owners observed significant cracks in walls, racked doorways, sloped and distorted flooring, and separations around the window openings, wall joints, and between floors and baseboards. The owners filed a lawsuit, and the parties generally agreed that differential settling caused the defects, but disputed the cause of those defects. The owners joined the insurer as a party to the lawsuit, and the insurer moved for summary judgment seeking a declaration that it had no duty to defend or indemnify the insured.

A "Subcontractor Endorsement" stated that "subcontractor caused property damage…. shall be deemed to have been … caused by an 'occurrence'; and … not to have been expected or intended from the standpoint of the insured." Among other arguments, the insurer contended that the Subcontractor Endorsement did not apply because the developer could not identify which subcontractor caused the alleged property damage, and, therefore, could not demonstrate that the Subcontractor Endorsement applied. The court, however, disagreed and refused to grant summary judgment to the insurer because, among other things, investigators concluded that a soil compaction issue caused by prior mining operations at the site could have been discovered had proper steps been taken. Thus, the court concluded that there was a material factual dispute precluding summary judgment because a subcontractor's failure to identify the soil conditions could have caused the damage.

Texas

1. *Amerisure Mut. Ins. Co. v. McMillin Tex. Homes, LLC*, 2022 U.S. Dist. LEXIS 40363, 2022 WL 686727 (W.D. Tex. Mar. 8, 2022).

Allegations of Damages to Property Other Than Insured's Work Sufficient to Trigger Duty to Defend

The insured was a developer, general contractor, and home seller that sought coverage in connection with several homeowner construction defect claims in which the homeowners identified certain defects in the artificial stucco and exterior finish of their homes. The insured tendered these claims to its general liability insurer, which, thereafter, commenced coverage litigation to secure a declaration that it did not owe coverage in connection with the claims. The insurer generally argued that its general liability policy was not a performance bond, and, therefore, did not cover claims arising out of the insured's faulty workmanship. The court, however, found the insurer owed, at a minimum, a duty to defend.

Specifically, the court held that the underlying allegations, while vague, could be reasonably interpreted to allege damages to property other than the exterior finish of the homes. For this reason, it found coverage was triggered under the general liability policy in the first instance. The court also held that coverage was not barred by the policy's business risk exclusions, finding the underlying allegations did not fall squarely within their terms. The court also determined that the allegations in the complaint were sufficient to create a reasonable possibility that tear-out work may also be covered under the policy because the extent of the property damage was unclear and it was unclear whether repair or removal of the stucco was necessary to fix any of the covered damages.

2. *Bitco Gen. Ins. Corp. v. Monroe Guar. Ins. Co.*, 31 F. 4th 325, 2022 U.S. App. LEXIS 9815 (5th Cir. Apr. 12, 2022).

Facts Extrinsic to the Complaint that go to the Merits of the Claim Cannot Determine the Duty to Defend

The insured was a commercial driller hired to drill a commercial irrigation well beneath the claim-

ant's farm. Claimant sued the insured for breach of contract and negligence arising from its work. The insured requested coverage from two of its general liability insurers. One of the two insurers disclaimed coverage for the suit, claiming coverage was barred by the policy's business risk exclusions and that the alleged property damage occurred outside the policy's policy period. Coverage litigation ensured.

The Fifth Circuit was tasked with reviewing the District Court's determination that the insurer owed the insured a duty to defend in connection with the underlying action. The Fifth Circuit affirmed the District Court's decision, finding that the complaint included allegations that created a reasonable possibility that the alleged property damage occurred during the relevant policy period and was not otherwise excluded. In doing so, the court strictly followed Texas's eight-corners rule, finding that evidence extrinsic to the complaint (i.e., a stipulation indicating when the drill bit got stuck and caused damage) could not be relied on to abrogate the insurer's defense obligation because the relevant facts went to the merits of the insured's liability. As to the business risk exclusions (and particularly exclusion j.), the court determined that the insurer failed to establish that the alleged property damage was limited to "that particular part" or property upon which the insured was working, and thus a duty to defend was triggered.

3. *Certain Underwriters at Lloyd's v. Keystone Dev., LLC*, 2022 U.S. Dist. LEXIS 51790, 2022 WL 865891 (N.D. Tex. Mar. 23, 2022).

Facts Extrinsic to Complaint that go to Merits of Claim Cannot Nullify Defense Obligation

The insured was a contractor at a project that was sued for construction defects and physical damages by the manager of the project. The project included the construction of four buildings with 24 three-story condominiums, and two buildings with 15 three-story condominiums. The project also included the construction of driveways, sidewalks, and a dog park. After the insured requested coverage for the suit from its general liability insurer, the insurer commenced a declaratory judgment action against the insured seeking a declaration of no coverage. In denying coverage, the insurer relied on two paragraphs excluding coverage when a project: (i) consists of more than 25 units or (ii) exceeds three stories or 36 feet in height.

In assessing the insurer's duty to defend, the court determined that the petition alleged facts that possibly implicated coverage under the policy that did not otherwise fall within a policy exclusion. Though the insurer sought to rely on facts extrinsic to the complaint to abrogate its defense obligation, the court refused to consider it in its analysis because the evidence proffered by the insurer overlapped with the merits of the facts alleged in the petition, which is not permitted under Texas law. As such, the court determined the insurer owed its insured a duty to indemnify.

4. *Millsap Waterproofing, Inc. v. United States Fire Ins. Co.*, 2022 U.S. Dist. LEXIS 90112, 2022 WL 1594341 (S.D. Tex. May 19, 2022).

"Cause Test" Applied to Find Damages From Insured's Work Involved Multiple Occurrences

The insured was a contractor hired by a condominium association to waterproof portions of certain condominiums, as well as pour concrete over balconies and patios at those condominiums. Issues quickly arose from the insured's work, which resulted in a suit by the condominium association and certain condominium owners against the insured, in which they alleged damage to the condominium complex. In the suit, the plaintiffs alleged the insured negligently performed its work, resulting in extensive water damage to the condominium's common areas and individual units. The insured thereafter requested coverage for the suit from its general liability and commercial umbrella insurers.

The primary issue in the coverage litigation was whether the insured's liability resulted from one or more occurrences. The court applied Texas's "cause approach" in determining the number of occurrences – i.e., focusing on the events that caused the injuries and gave rise to the insured's liability, rather than on the number of injurious effects. In doing so, the court determined that the injury-causing events (i.e., the insured's work performed on multiple, distinct phases of the project) were sufficiently distinguishable in space and time so as to not constitute a single "occurrence" under the policy. For that reason, the court, addressing the limited issue before it, determined that the lawsuit against the insured involved more than one "occurrence."

5. *Mt. Hawley Ins. Co. v. J2 Res. LLC*, 2022 U.S. Dist. LEXIS 97394, 2022 WL 1785483 (S.D. Tex. June 1, 2022).

Claims for Costs of Insured's Defective Product Are Not With Coverage Under a General Liability Policy

The insured was a vendor of industrial pipe joints, valves, and fittings that was sued by one of its consumers for defective pipe that it sold. In its suit, the consumer asserted claims for breach of contract, breach of express warranty, and breach of implied warranty of merchantability. It claimed that the pipe exhibited extensive chopping and coating failure and that the coating on the pipe was not adhering to the pipe. The lawsuit stemmed from the insured's refusal to pay for removal and replacement of the pipe.

After being placed on notice of the consumer's suit, the insured's general liability insurer commenced a declaratory judgment action seeking a declaration that it need not defend or indemnify the insured in connection with the consumer's suit. The insurer argued that the consumer's suit did not involve "property damage" as the policy defines that term because the underlying suit did not allege damage to tangible property, or loss of use of property, and was simply limited to allegations that the pipe the insured sold was defective. The court agreed.

The court also agreed that even if property damage were alleged, coverage would be barred by the Your Product Exclusion and Impaired Property Exclusion. Specifically, the court found that the consumer's claims to recover the original purchase price and costs associated with the inspection of the defective pipe were barred by the Your Product Exclusion, and any damage to pipeline in which the insured's pipers were incorporated would be barred by the Impaired Property Exclusion. As such, the court determined the insurer did not owe a defense or indemnification in connection with the consumer's lawsuit.

6. *Siplast, Inc. v. Emps Mut. Cas. Co.*, 23 F. 4th 486, 2022 U.S. App. LEXIS 795 (5th Cir. 2022).

Cause of Action for Breach of Guarantee Still Alleged Covered Property Damage

The claimant purchased a roof membrane system from the insured to be installed at a high school in New York, with which the insured provided a 20-year guarantee. After its installation, the school observed water damage in the ceiling tiles throughout the school. Though the insured returned to the premises in an attempt to repair any damage and prevent leaks, the school continued to suffer additional leaks and water damage. After retaining a consultant to assess the water-leak issues, the claimant determined that the roofing membrane system had failed and that its only way to remediate the issues was to install a new one. When the insured refused to honor the guarantee it provided on its roofing system, the claimant sued. The claimant asserted a single cause of action for "Breach of the Guarantee." The insured requested coverage for the suit from its general liability insurer, who denied coverage.

The lone issue in the coverage litigation was whether the underlying complaint contained allegations of damage to property other than the insured's roof membrane as a part of the cause of action for "Breach of the Guarantee." The court determined that, liberally construed, it did, thus triggering the insurer's defense obligation. Specifically, the court determined that though the lone cause of action was for breach of the guarantee, the court interpreted that claim to include a request for compensatory damages associated with the water damage to the school. As a result, the court held that there were allegations of "property damage" caused by an "occurrence" that were not otherwise excluded, thus triggering the insurer's defense obligation.

7. *Sustainable Modular Mgmt. v. Travelers Lloyds Ins. Co.*, 2022 U.S. Dist. LEXIS 105728, 2022 WL 2134022 (N.D. Tex. June 14, 2022).

Defective Workmanship Exclusion May Bar Coverage For Claim Under First-Party Property Policy

The insured installed a modular building. The insured subcontracted the readying of the building site, including site grading, to a subcontractor. After the modular building was completed, elevated moisture levels and visible mold growth were observed. The cause was determined to be inadequate insulation on the floor of the trailer, combined with high humidity and moisture observed in the soil. Subsequent tests indicated water intrusion and mold growth were caused by deficient site grading, coupled with the lack of ventilation in the crawl space skirting.

The insured sought coverage from its inland marine insurer for the costs associated with the remediation;

however, the insurer determined from the adjuster's report that the cause of loss was surface water and defective construction, neither of which were covered under the policy. The insurer denied coverage.

In the ensuing coverage litigation, the insurer argued, among other things, that the loss was barred by the policy's defective workmanship, construction, and maintenance exclusion because the damages resulted from moisture coming from below the building. The insurer argued that if the source of the water infiltration and mold was humidity and moisture (which appeared to be in dispute), the coverage would be barred by this exclusion since it was determined that the moisture coming from below the building was the result of improper drainage and the lack of a moisture barrier. Notably, the insured did not respond to this argument. The court determined that if the insurer showed at trial that the moisture in the crawl space caused or contributed to the mold and water damage, coverage would be barred by the exclusion.

Virginia

1. *Pennsylvania Natl. Mut. Cas. Ins. Co. v. Riv. City Roofing, LLC*, No. 3:21cv365-HEH, 2022 U.S. Dist. LEXIS 73676 (E.D. Va. Apr. 21, 2022).

On motions for reconsideration, the court awarded summary judgment to an insurer arising out of a dispute over whether the insured's alleged faulty workmanship triggered obligations to defend or indemnify the insured. A general contractor sued the insured roofer in an underlying lawsuit alleging that the insured was responsible for all roofing and aluminum and composition siding according to the plans and specifications, which was subject to a contract between the general contractor and insured in which the insured warranted its materials, agreed to indemnify the general contractor, and agreed to name the general contractor as an additional insured.

The insurer argued that the policy did not provide coverage for several reasons, including that the insurer cancelled the policy for nonpayment prior to the manifestation of the alleged property damage. The court rejected the insurer's argument on this ground because the underlying complaint against the insured did not allege cancellation of the insurance policy and, therefore, the court refused to consider the extrinsic evidence provided by the insurer regarding cancellation.

The court ultimately concluded that even if the insured's work was deemed an occurrence, coverage was excluded by the Your Work Exclusion, Exclusion j, and/or the Impaired Property Exclusion. The court also explained that the Contractual Liability Exclusion also barred coverage because it encompassed all of the allegations being made against the insured, which were essentially that the insured had breached its contractual obligations.

Washington

1. *Twin City Fire Ins. Co. v. Lundberg, LLC*, No. C20-1623-JCC, 2022 U.S. Dist. LEXIS 23545 (W.D. Wash. Feb. 9, 2022).

The insured installed fire and explosion mitigation systems in a manufacturer's paper mills. After installation, the manufacturer had the systems independently tested, which resulted in the discovery of various defects. The manufacturer elected to remove and replace the devices at its own expense and filed a lawsuit to recoup its costs incurred in purchasing, maintaining, testing, and replacing the systems. The insurer defended the insured in that suit and filed a declaratory judgment action seeking a declaration of no coverage because the manufacturer's lawsuit did not allege covered damages, or was otherwise barred by policy exclusions.

The insurer contended that the underlying accident was not an "occurrence" because any issues with the equipment installed by the insured arose from design defects and not manufacturing defects. The court disagreed, however, because the complaint alleged that the installed equipment was defective as "manufactured" as well as designed. The court also rejected the insurer's arguments regarding an engineering exclusion, the Your Work Exclusion, and the Impaired Property Exclusion because allegations in the complaint alleged conduct that fell outside each of those exclusions. Thus, the court granted the insured's motion for summary judgment regarding the duty to defend.

2. *Val. Forge Ins. Co. v. Washington Sq. Hotel Holdings, LLC*, No. C21-0847JLR, 2022 U.S. Dist. LEXIS 20599 (W.D. Wash. Feb. 4, 2022).

The insured was the general contractor on a project to construct a hotel and subcontracted rough carpentry,

including rough sheathing. The project suffered numerous delays because various aspects of the framing contractor's work failed inspections and the framing subcontractor left the project without remedying the work. In addition, during construction, the roof leaked during storms and caused damage to interior and HVAC elements. The insured missed project deadlines, including an extended deadline, and was eventually terminated from the project by the owner. The insured entered receivership and the owner submitted a multi-million dollar claim for breach of contract related to the project.

The insurer opened a claim investigation of the owner's breach of contract claim. Seventeen months later, the insurer agreed to defend the insured against the owner's claim under a reservation of rights. Subsequently, the insured and owner entered into an agreement involving a stipulated judgment against the insured, and the insured assigned its rights against the insurer. The insurer filed suit and sought declaratory relief. The court found that the complaint alleged property damage caused by an occurrence. However, because the owner was required to bring all claims against the insured in the receivership action, the only claims were for breach of contract, to which the contractual liability exclusion applied.

The court also considered and found that an Ongoing Operations Exclusion applied. That exclusion applied whenever the insured "or any contractors or subcontractors working directly or indirectly on [the insured's] behalf are performing operations." Despite the framing subcontractor's departure and replacement with a new subcontractor, the insured's work on the project was still ongoing and, therefore, the Ongoing Operations Exclusion applied, as well as other exclusions.

3. *Wiegert v. TM Carpentry, LLC*, 978 N.W.2d 207 (Wis. Ct. App. 2022).

The insured agreed to remodel a home, including lifting the home off its foundation to add height in the basement. The insurer's policy period ended during the remodeling project, and the insured did not renew that policy. Immediately after the insured lifted the house, the homeowners noticed damages to the interior of the house, including cracked walls and separated shoe moldings. As a result of the damage, the homeowners filed suit against the insured for the damages. The insurer intervened and moved for a declaration that it had no duty to defend. The trial court granted judgment for the insurer, and an appeal followed.

The appellate court upheld the trial court's opinion. The policy required that any property damage take place during the policy period. The only renovation work that was performed during the policy period was lifting of the house. The owners observed damage to their home immediately after the insured lifted it. The appellate court found that the policy's exclusion for property damage to "that particular part" of the home on which the insured was working barred coverage. Specifically, when the insured lifted the home, the particular part of property on which it was working was the entire home and, therefore, the policy excluded any damage to the home that took place during that process. ■

MEALEY'S LITIGATION REPORT: CONSTRUCTION DEFECTS INSURANCE
edited by Timothy J. Raub
The Report is produced monthly by

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ISSN 1550-2910