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Construction Defects Insurance

Construction Defect Claims: A 2019 Update Part I

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Commentary

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Introduction

Courts nationwide continue to differ in their decisions regarding construction defect insurance coverage cases. While these cases can implicate a wide variety of insurance coverage issues, the vast majority of the 2019 cases concern commercial general liability policies. Common issues include whether the insuring agreement is triggered, i.e., whether a lawsuit against the insured alleges "property damage" that results from an "occurrence," and whether any of the policy's Business Risk Exclusions apply to bar coverage. However, some of the decisions below involve professional liability policies and various other coverage issues, such as when particular damages are alleged to have occurred. There were numerous construction defect insurance coverage cases decided by Florida courts in 2019 that are discussed below, and stay tuned for Part II, which will include a discussion of, *inter alia*, the many Texas cases.

Alabama

Nationwide Mut. Fire Ins. Co. v. David Grp., Inc., No. 1170588, 2019 Ala. LEXIS 52, 2019 WL 2240382 (Ala. May 24, 2019).

The insured is a contractor specializing in the construction of custom newly built or remodeled homes. The underlying claimants purchased a newly constructed home from the insured, but shortly after moving in, they began to experience problems. The claimants filed suit against the insured alleging faulty workmanship and construction defects, among other things, but the suit was eventually compelled to arbitration. The insured's CGL carrier initially defended the insured but withdrew from the defense after conducting its own investigation and concluding the damages complained of did not constitute an occurrence under the CGL policy. Subsequently, the insured initiated this action against the carrier seeking defense and indemnity. This suit was stayed pending the outcome of the arbitration. The arbitrator made an award to the claimants of $12,725. The insured and carrier cross-moved for summary judgment and the trial court entered partial summary judgment for the insured. The trial court held that because the complaint alleged and the award indicated consequential property damage, the insured was entitled to defense and indemnity coverage. The carrier appealed.

The court recognized Alabama precedent, which holds that faulty workmanship does not constitute an "occurrence" under a CGL policy because such defective work is not considered "accidental," and the intent of CGL coverage is not to act as a guarantor of a contractor insured's workmanship. However, when damage to property other than the contractor's workmanship

occurs, such damage is caused by an "occurrence." The court focused on the underlying plaintiff's allegations, which included allegations of faulty workmanship but did not allege consequential damage resulted to other property, and therefore reversed the decision.

Arizona

Sunwestern Contractors Inc. v. Cincinnati Indem. Co., 390 F. Supp. 3d 1009 (D. Ariz. 2019).

The underlying dispute in this case involved the construction of a water main collector system in Arizona that included 17,200 feet of pipeline. The insured, a contractor on the project, performed the installation of the flanges, among other work. During a pressure test of the pipeline, several flanges failed and came apart causing water to tear out the gaskets and seriously damaging the pipe and component parts. The water that escaped also needed to be pumped out of a collecting trench. The insured's customer asserted a claim against the insured's commercial general liability policy, and after performing an investigation, the carrier denied, and this coverage suit followed.

In its summary judgment motion, the carrier argued that the underlying allegations did not allege "property damage" resulting from an "occurrence." The court observed that although Arizona law holds allegations of damage solely to faulty workmanship is not an occurrence, here, serious property damage to other property resulted from the insured's defective installation of the flanges, so an "occurrence" was alleged. Next, the carrier claimed that coverage was precluded by the policy's real property (j(5)) and your work exclusions (j(6) and (l)). The court held that exclusions j(5) and j(6) barred coverage for the incorrectly performed work that was still in progress, while exclusion (l) barred coverage for the work that had been completed. According to the court, all damage caused by the defectively installed flanges qualified as real property. The court rejected the insured's contentions that the exclusions were ambiguous and entered summary judgment for the carrier.

Colorado

Kalman Floor Co. v. Old Republic Gen. Ins. Corp., No. 117CV01703LTBKMT, 2019 U.S. Dist. LEXIS 3319, 2019 WL 132138 (D. Colo. Jan. 8, 2019).

The insured was hired to construct a concrete floor, but there was damage to the floor once constructed. The insured sought coverage under its liability policy, but filed this coverage action when the carrier denied coverage. The carrier asserted that there was no coverage because the only damage was to the insured's work product itself. In response, the insured relied on a particular 2007 case from Minnesota (*Web Const. Inc. v. Cincinnati Ins. Co.*, No. CIV 06-5061(RHK/AJB), 2007 U.S. Dist. LEXIS 87783, 2007 WL 4230751 (D. Minn. Nov. 29, 2007)), but the court rejected its application and determined that there was no coverage under the policy. Specifically, because the insured was hired to install the floor, and the insured admitted that there was no damage to anything but the floor, so there was no "property damage."

Rockhill Ins. Co. v. CFI-Glob. Fisheries Mgmt., 2019 U.S. App. LEXIS 22049, 782 F. App'x 667 (10th Cir. 2019).

A professional liability carrier commenced suit against its insured-contractor seeking a declaration that it did not owe coverage for damages awarded to an owner for the insured's defective design and construction of a river enhancement project. The carrier asserted that no coverage was owed in connection with the owner's claims based on the policy's Faulty Workmanship exclusion, which barred coverage for damages "[b]ased upon, arising out of or for any loss, cost or expense incurred to withdraw, recall, inspect, repair, replace, adjust, remove or dispose of 'your work.'" The court's analysis was focused on whether the term "work" applied to damages arising just from the construction of the project, or whether failures in the design of the project were included within the scope of the exclusion as well. The court found that, in the context of the full language of the exclusion, it did not apply to design failings in the project, and remanded the matter to the district court to consider whether damages arising from an underlying arbitration award could be apportioned between design and construction.

Florida

Amerisure Ins. Co. v. Auchter Co., No. 3:16-CV-407-J-39JRK, 2019 U.S. Dist. LEXIS 25135, 2019 WL 632297 (M.D. Fla. Feb. 14, 2019).

The coverage dispute arose out of damages resulting from faulty workmanship during the construction of a 13-story office building. During construction, the general contractor for the project experienced financial problems, and at one point, its construction contract

surety took over the project. The owner eventually brought a lawsuit against both the general contractor, its surety, and various subcontractors on the project. The owner's underlying action culminated in a 28-day trial and 87-page final judgment.

At issue in this decision were numerous dispositive motions filed by carriers for the general contractor and a subcontractor responsible for the installation of a window system at the project. The primary issue was whether the subcontractor's carrier had a duty to indemnify any insured in connection with underlying judgments for the repair and replacement of the window system at the project, which was improperly installed by the subcontractor, resulting in water intrusion and damage to other parts of the project. In 2018, the court, applying Florida law, had already determined that the general contractor's carrier was obligated to indemnify the general contractor for costs to repair both the window system and other property that was damaged as a result of the faulty workmanship of the subcontractor. The subcontractor's carrier, however, argued that Florida law did not apply to the interpretation of its policy, which was governed by Georgia law, rendering the precedent relied on by the court in interpreting the general contractor's policies (i.e., *Carithers v. Mid-Continent Cas. Co.*, 782 F.3d 1240 (11th Cir. 2015)) inapplicable. The court disagreed, noting that Georgia and Florida took "symmetrical approaches to interpreting insurance policies," and because damage to other property was indisputably caused by the subcontractor's faulty workmanship, which had to be repaired in order for other damaged property to be repaired, the carrier had a duty to indemnify.

Next, the court looked to whether the defective workmanship and resulting damages constituted a single occurrence under the policy or multiple occurrences such that several limits were implicated. The court determined that, as it pertained to costs of damages resulting from water infiltration from the defective window system, all of the injuries were attributable to a "single, repeated harmful condition," i.e., the faulty installation of the window system. As a result, the court determined there was only one occurrence.

S.-Owners Ins. Co. v. MAC Contractors of Fla., LLC, 768 F. App'x 970 (11th Cir. 2019).

The insured was a general contractor hired to construct a custom-built residence. During the course of the project, issues arose between the owner of the project and the contractor, which resulted in the contractor leaving the site before the job was complete and before a certificate of occupancy was issued. The owner thereafter sued the contractor for numerous construction defects and damages discovered at the project, including "damage to wood floors and the metal roof" that the contractor "failed to remediate despite its assurances that the damages would be repaired."

The contractor's commercial general liability carrier initially agreed to defend it in the action by the owner, but later withdrew its defense and commenced a declaratory judgment action seeking a declaration of no coverage based on the policy's "Your Work" exclusion, which barred coverage for "'[p]roperty damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" The insured argued that the exclusion was inapplicable because the complaint in the owner's action was silent as to the timing of the alleged damages, and that it could reasonably be construed to allege "property damage" during the ongoing operations. The court agreed, citing specifically to the allegation that the contractor assured the owner it would repair the wood floors and metal roof, which the court reasonably inferred would have been made before the contractor abandoned the project, taking it outside the scope of the "products-completed operations hazard."

The appellate court refused to address the issue of whether the owner in fact alleged "property damage" in the first instance, as was necessary to trigger coverage, because that issue was not considered by the district court.

S.-Owners Ins. Co. v. Sanborn Builders, Inc., No. 3:18CV145-MCR-CJK, 2019 U.S. Dist. LEXIS 40940, 2019 WL 654540 (N.D. Fla. Feb. 6, 2019).

The insured was a contractor retained to build a home. The owners of the home were dissatisfied with the result, and sued the contractor for breach of contract, negligence, breach of implied warranty, and violation of Florida Statute § 553.84. The contractor's general liability carrier commenced suit against the contractor seeking a declaration that it had no duty to defend or indemnify the contractor in connection with the owners' action based on, *inter alia*, the "Your Work" exclusion.

During the coverage action, a discovery dispute arose related to certain interrogatories served by the contractor on the carrier relating to premium rates and content of other policies issued by the carrier that were not the subject of the litigation. The insured asserted such discovery was relevant to its argument that the policy issued by the carrier provided only illusory coverage. The court disagreed, noting that the policy's "Your Work" exclusion merely limits coverage under the policy to damage to other property, i.e., property not put in place by the insured. As a result, the discovery sought by the contractor was deemed irrelevant, and the contractor's motion to compel was denied.

Auto-Owners Ins. Co. v. Envtl. House Wrap, Inc., No. 3:17-CV-817-J-34PDB, 2019 U.S. Dist. LEXIS 115898, 2019 WL 3069080 (M.D. Fla. July 12, 2019).

A general contractor was hired to construct a 24-townhome community. The homeowners association responsible for the maintenance of the townhomes sued the general contractor and various other entities for damages caused by alleged defects in the construction of the project, including damages resulting from water infiltration caused by the faulty workmanship of a subcontractor at the project responsible for the installation of the building wrap, flashing, and waterproof system. There was no dispute that there was property damage caused by an occurrence such that coverage was triggered for the subcontractor under its own liability policy. However, the subcontractor's liability carrier denied that it owed any obligation to defend or indemnify the general contractor, who qualified as an additional insured under its policy, in connection with the suit. The subcontractor's carrier thereafter commenced a coverage action seeking a declaration of no coverage as to the general contractor based on, *inter alia*, the policy's "Your Work" exclusion.

The policy's "Your Work" exclusion bars coverage for "'[p]roperty damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" In dispute was whether the underlying complaint alleged damage that occurred during ongoing operations at the project. The general contractor asserted that the exclusion did not apply because the definition of products-completed operations hazard focuses on the timing of completion of the work, not timing of the damages, and that because the insured was seeking coverage under the policy only after the work at the project was completed, it fell within the products-completed operations hazard. The court rejected the general contractor's argument, noting that "[a] completed operations exclusion bars coverage for [damages] that occur after the insured completed its work on a particular operation," and that under Florida law, the relevant consideration is when the project was completed in relation to when the damages occurred.

BITCO Nat'l Ins. Co. v. Old Dominion Ins. Co., 379 F. Supp. 3d 1230 (N.D. Fla. 2019), *reconsideration denied*, No. 3:17CV262/MCR/HTC, 2019 U.S. Dist. LEXIS 144152, 2019 WL 3855321 (N.D. Fla. May 2, 2019).

A general contractor was sued for property damage that it alleges was due to defective work performed by two subcontractors at a project. The general contractor's liability carrier, as its subrogee, commenced suit against the subcontractors' carriers seeking additional insured coverage for the general contractor in connection with the claims for property damage. The subcontractors' carriers, however, denied any obligation to defend or indemnify the general contractor.

The first subcontractor's carrier denied coverage on the basis that the underlying complaints did not allege that the subcontractor's work was defective or that it resulted in property damage as defined by the policies. The court agreed, finding that the underlying complaints, and a separate engineering report relied on by the general contractor, did not describe any faulty or defective work that it "fairly and potentially" attributable to the subcontractor.

The second subcontractor's carrier conceded that the engineering report and an underlying counterclaim alleged defective work by its insured, but argued that no coverage was owed because 1) none of the alleged property damage occurred during the applicable policy periods; and 2) the policy's exclusion for Exterior Insulation and Finish Systems exclusion (EIFS exclusion) applied. The court rejected the carrier's first argument, applying an "injury-in-fact" approach to the allegations in the underlying counterclaim and engineering report to find that they could be construed to allege that the damage attributable to its insured occurred during its policy period. However, the court did find that the EIFS exclusion applied to bar coverage. The EIFS exclusion barred coverage for damage arising out of the

insured's work "with respect to any exterior component if an [EIFS] is used on any part of that structure." Because EIFS was used on exterior soffits and ceilings throughout the project and the second subcontractor worked only on the exterior components of the project, the court found that the exclusion applied to bar coverage.

Atl. Cas. Ins. Co. v. Innovative Roofing Sys., Inc., 411 F. Supp. 3d 1287 (M.D. Fla. 2019).

A commercial general liability carrier commenced suit against its insured-roofing contractor for a declaration that no coverage was owed in connection with claims asserted by the general contractor relating to the insured's allegedly defective roofing work. In doing so, the carrier relied on a Roofing Limitation Endorsement, which barred coverage for property damage resulting from operations involving "any hot tar, wand, sprayed or sprayed-on material, torch or heat applications, hot membrane roofing or any membrane roofing system requiring heat application." The court held that the allegations in the underlying complaint fell squarely within the scope of this exclusion, granting the carrier's motion for final default judgment.

Mid-Continent Cas. Co. v. Delacruz Drywall Plastering & Stucco, Inc., 766 F. App'x 768 (11th Cir. 2019).

The insured was a drywall subcontractor retained by a general contractor to perform certain work at a project. The general contractor was sued by the owners of the project for defective construction at the project. The general contractor thereafter sued the insured-subcontractor in connection with the alleged defective construction. The subcontractor's carrier commenced a declaratory judgment action seeking a declaration that it did not owe coverage to the subcontractor in connection with the general contractor's action on the basis that the construction took place outside of the insurance policies' effective dates. The carrier moved for summary judgment on this basis, but the district court denied its motion on the basis that a determination as to its duty to indemnify was not ripe because the subcontractor's liability was not yet established in the underlying action. The carrier appealed, and the Eleventh Circuit affirmed the district court's decision, finding in that context that the carrier's duty to indemnify its insured was not ripe for adjudication until the underlying lawsuit was resolved.

Hartford Fire Ins. Co. v. Beazer Homes, LLC, No. 2:19-cv-454-FtM-38MRM, 2019 U.S. Dist. LEXIS 187810, 2019 WL 5596237 (M.D. Fla. Oct. 30, 2019).

A liability carrier commenced suit against a general contractor and its subcontractor seeking a declaration as to "the extent of its coverage obligations" in connection with an underlying construction defect case. The court, relying on the decision in *Mid-Continent Cas. Co. v. Delacruz Drywall Plastering & Stucco, Inc.*, 766 F. App'x 768 (11th Cir. 2019) (discussed above), found that the carrier's duty to indemnify its insured was not ripe for adjudication until the underlying lawsuit was resolved and dismissed the carrier's complaint. The court rejected the carrier's attempt to distinguish *Delacruz* on the basis that the carrier sought a declaration as to its duty to indemnify, while in this case the carrier was merely seeking a declaration of the "extent of its coverage obligations," finding the alleged distinction merely "[w]ordplay" and that the coverage obligations for which it sought clarification were its duty to indemnify.

Nat'l Builders Ins. Co. v. Bradford Building Corp., No. 6:17-cv-977-Orl-41KRS, 2019 U.S. Dist. LEXIS 80649, 2019 WL 2012989 (M.D. Fla. Jan. 15, 2019).

The insured contractor was sued by the owner of a residential construction project completed by the insured for alleged defects in the project. The carrier commenced a declaratory judgment action against its insured and the owner seeking a declaration that it did not owe the insured a duty to defend or indemnify in connection with the underlying action. The court denied the carrier's motion for default judgment against its insured on the basis that the underlying action was ongoing, rendering any declaration as to its duty to indemnify premature. The court further held that because the carrier's duty to defend claim was based exclusively on the argument that it had no duty to indemnify, and therefore no duty to defend, it was equally premature.

Georgia

Cowart v. Nautilus Ins. Co., No. 4:17-CV-142, 2019 U.S. Dist. LEXIS 8531, 2019 WL 254662 (S.D. Ga. Jan. 17, 2019).

The underlying plaintiff hired the insured to construct a pool, hot tub, and deck in her backyard. The insured

failed to obtain any permits or comply with mandatory inspection requirements for this kind of work before commencing the project despite knowing that the local county building department would likely issue a "stop work" order if it discovered the unpermitted construction. The insured excavated the hole for the pool, installed steel support, poured concrete for the pool shell, poured the cement steps for the pool, and installed some tile when the county's building departments served a "stop work" order. Around the same time, due to growing concerns about the work, the underlying plaintiff's attorney sent the insured a demand letter claiming the work was defective because of the failure to secure permits and the faulty workmanship, including insufficient thickness and composition of the pool shell, improper bonding, insufficient drainage, improperly installed lighting, and unsafe steps. The insured forwarded the demand letter to his CGL carrier, who, after conducting a coverage investigation, denied coverage. Further, the CGL carrier denied coverage for the customer's claim in response to the customer's demand letter sent directly to the carrier.

The customer subsequently filed a lawsuit against the insured alleging defective construction, faulty workmanship, and diminution of value to the property and sought to recover the costs of remediating the defective work. The insured tendered the lawsuit to his carrier, who again denied coverage. The insured instituted this declaratory judgment action after the carrier declined to defend contending the carrier breached its duty to defend under the CGL policy. The carrier filed a motion for summary judgment in which it argued 1) the claims against the insured were not claims for "property damage" as defined by the policy; and 2) the claims were excluded by the Business Risk Exclusions in the policy.

According to the court, in Georgia the duty to defend is based on the allegations contained in the underlying complaint, but even if the complaint fails to allege facts that bring the claim potentially within the policy's coverage, a duty to defend may still exist where the insured advises its carrier of facts extrinsic to the complaint that bring the claims potentially within coverage. Therefore, the court examined the customer's pre-suit demand letter and the allegations in the complaint in determining the carrier's duty to defend. The court determined that the carrier had no duty to defend the insured for the underlying plaintiff's claims because neither the pre-suit demand letter nor the complaint included allegations of damage to property other than the insured's allegedly defective and unpermitted work. The court noted that alleged diminution in value of real property resulting from faulty workmanship does not constitute "property damage" either because it is not physical injury to tangible property or resulting loss of use. Moreover, *in dicta*, the court observed the policy's Business Risk Exclusions ((j)(5) and (j)(6)) also precluded coverage for the underlying plaintiff's claims as the alleged property damage was limited to the project itself and arose from the insured operations. Thus, the court granted the carrier's motion for summary judgment.

Illinois

Hartford Cas. Ins. Co. v. Hench Control Corp., No. 16-cv-10794, 2019 U.S. Dist. LEXIS 155425, 2019 WL 4345353 (N.D. Ill. Sept. 12, 2019).

The insured was a subcontractor hired by a contractor to design and provide a refrigeration control system (RCS) to be included within a refrigeration system. The RCS did not work properly, and the contractor sued the subcontractor for breach of contract. The contractor prevailed on its claim for breach of contract at a bench trial. The subcontractor's carrier thereafter commenced a declaratory judgment action seeking a declaration that it was not obligated to defend or indemnify the subcontractor in connection with the contractor's action or award.

The court in the coverage action found that the damages sought by the contractor against the subcontractor were explicitly excluded by several provisions in the carrier's policy. First, the court explained that the policy excluded coverage for contractual liability, as well as liability for the subcontractor's failure to perform a contract or agreement in accordance with its terms, thus barring coverage for the contractor's claim in its entirety. The court also found that coverage in connection with the contractor's action was barred by the policy's exclusion for damages incurred due to the insured's own defective products (the defective RCS). Finally, the court concluded that, even if the exclusions did not apply, under Illinois law, the subcontractor's installation of a non-performing RCS did not amount to an "occurrence" under the policy, as was necessary to trigger coverage. Therefore, the court held that the carrier did not owe a duty to defend or indemnify in connection with the contractor's action.

Acuity Ins. Co. v. 950 West Huron Condominium Assoc., No. 1-18-0743, 2019 IL App (1st) 180743 (Ill. Ct. App. Mar. 29, 2019).

The insured subcontractor was retained by a general contractor to work on a project involving the building envelope of a condominium. The general contractor was sued by the condominium association for defective construction, and the general contractor filed a third-party complaint against numerous subcontractors at the project, including the insured. The insured was insured under two separate liability insurance policies that were on the risk during the relevant time period. One carrier agreed to defend the insured in connection with the claims, which it eventually settled, while the other denied any coverage obligations from the outset. The defending carrier intervened in the underlying action and asserted a claim against the other carrier, seeking a declaration as to its coverage obligations and equitable contribution.

The defending carrier argued that the complaint contained allegations that the insured's negligence contributed to defects in the building that interfered with the habitation and usage of the common elements of the building, thus constituting an occurrence causing property damage under the policy. The other carrier, however, argued that the alleged damages were the "natural and ordinary consequence" of poor workmanship, and were therefore not an accident or "occurrence" under a commercial general liability policy. The court agreed with the defending carrier, finding that from the eye of the subcontractor, the project is limited to the scope of its own work, and therefore damage to something outside of that scope is unknown and unforeseeable, and will therefore constitute an occurrence sufficient to trigger coverage, thus triggering the carrier's defense obligation.

The court also determined that the defending carrier was entitled to equitable contribution because, although the policies covered different policy periods, they insured the same risk, entitling the defending carrier to reimbursement for amounts paid in excess of its share of the loss.

Certain Underwriters at Lloyd's London v. Metro. Builders, Inc., No. 1-19-0517, 2019 IL App (1st) 190517 (Ill. Ct. App. Dec. 18, 2019).

The insured was a general contractor retained for a construction project in Chicago, during which a wall adjoining two structures upon which it was working collapsed. The structural damage resulting from the collapse rendered the structures unsafe, resulting in their demolition. The owner of the structure being constructed by the insured sued its property carrier for indemnification and reimbursement for damages it suffered, including costs for "repairs, demolition, construction, and other associated expenses arising from" the collapse. The property carrier indemnified the owner, and invoked its subrogation rights and sued the general contractor to recover the amounts expended in connection with the claim.

The general contractor's liability carrier denied coverage to the general contractor and commenced a declaratory judgment action to obtain a declaration of no coverage. The carrier argued that the underlying action did not seek "property damage" caused by an "occurrence," as was necessary to trigger coverage. The court agreed with the general contractor's carrier as it relates to damage to real property suffered by the property owner, which it held did not constitute property damage at the project because it only amounted to economic loss-the cost of repair and replacing the demolished buildings to fulfill the owner's contractual expectations. However, the court concluded that the owner's claim relating to damaged "personal property" was a claim for damages to something other than the property itself, thus constituting "property damage" caused by an "occurrence," triggering coverage.

Essex Ins. Co. v. Blue Moon Lofts Condominium Assoc., 927 F.3d 1007 (7th Cir. 2019).

The insured contractor was retained to design and construct a building. Upon its completion, a condominium association for whom the building was built sued for damages arising out of the insured's allegedly defective design and construction. The insured's liability policy only provided coverage for claims first made against the insured between May 2012 and May 2013, while the claim made by the condominium association was filed in 2002. However, given issues relating to confirmation of service of the insured in 2002, the carrier agreed to defend the insured during the course of the litigation, until it was later discovered that the insured was in fact properly served with the complaint in 2002, and a prior default judgment was reinstated.

The carrier continued to defend its insured while commencing a coverage action seeking a declaration of no coverage. The insured did not dispute that the claim was outside the scope of the carrier's policy period, but instead argued that the insured should be estopped from denying coverage because it was prejudiced from the carrier's conduct while defending the claim. The court disagreed, finding that the insured in fact never lost control of its defense. As a result, the court found that the carrier was not obligated to provide coverage to the insured in connection with the underlying action and the default judgment arising therefrom.

Indiana

Liberty Mut. Ins. Co. v. Dometic Corp., 371 F.Supp.3d 472 (N.D. Ind. Mar. 6, 2019).

The insured sold gas absorption refrigerators, primarily for RVs, which contained a defective cooling unit that could leak flammable gases and cause fires. The insured was named as a defendant in three putative class actions that alleged the refrigerators contained dangerous defects that, in some circumstances, caused fires. Two of the three complaints alleged such fires caused damage to property other than the refrigerator itself. The carrier agreed to defend its insured subject to a reservation of rights, and commenced a declaratory judgment action seeking to abrogate that defense obligation and get a declaration of no coverage.

In the coverage action, the carrier argued it had no duty to defend because all of the alleged property damage occurred after the carrier's policies expired. The court, however, looked to the definition of the putative class members to determine if that included potential members whose property damage could have occurred during the relevant policy periods. While the carrier argued this analysis was far too speculative, the court was not persuaded, finding the carrier had a duty to defend on the basis that potential claims from a putative class triggered the duty to defend. The court further held that a determination as to the carrier's duty to indemnify was premature because the underlying actions were ongoing.

Kansas (interpreting New York law)

Black & Veatch Corp. v. Aspen Ins. (Uk) Ltd., 378 F. Supp. 3d 975 (D. Kan. 2019).

Last year in this publication, we analyzed the Tenth Circuit's decision in *Black & Veatch Corp. v. Aspen Ins. (Uk) Ltd*, 882 F.3d 952 (10th Cir.), *cert. denied sub nom. Aspen Ins. (UK) Ltd. v. Black & Veatch Corp.*, 139 S. Ct. 151 (2018). In that case, the court construed New York law, and the insured was a global engineering, consulting, and construction company that was hired to construct several jet bubbling reactors to eliminate contaminants from coal-fired power plants. The insured subcontracted the construction of some of the components to another company. At some point it was discovered that the subcontractor had negligently constructed the parts.

In the prior decision reversing the lower court's granting of summary judgment to the insurance carrier, the Tenth Circuit indicated that the primary question on appeal was whether the New York Court of Appeals would determine that the property damage at issue was an occurrence under the policy. The court noted that New York state courts had not resolved whether subcontractor damages could constitute an occurrence. In a lengthy opinion, the court analyzed the history of the CGL policy coverage form, opinions from outside New York, and various New York cases. The Tenth Circuit concluded that the damages at issue were caused by an occurrence because the insured never intended that the subcontractor would perform faulty work. The Tenth Circuit also concluded that determining that the subcontractor's faulty work was not an occurrence would render the Subcontractor Exception to the Damage to Property Exclusion meaningless. The Tenth Circuit then predicted that the New York Court of Appeals would decline to follow New York appellate division decisions that would not support the Tenth Circuit's analysis. The Tenth Circuit then vacated the district court's prior order and remanded the case back to the federal district court.

The parties filed subsequent summary judgment motions, which was the subject of this particular case. Much of the analysis in this decision was focused on the fact that many of the issues submitted by the parties to be decided in the motions had already been determined by the prior Tenth Circuit decision, which was the law of the case. Ultimately, the court denied the carrier's motion for summary judgment but partially granted the insured's motion, which related to the policy's priority of coverage vis-a-vis other applicable policies.

Louisiana

Gilchrist Constr. Co., LLC v. Travelers Indem. Co., No. CV 18-0925, 2019 U.S. Dist. LEXIS 162519, 2019 WL 4640007 (W.D. La. Sept. 23, 2019).

Landowners filed the underlying suit against the insured alleging the insured breached the parties' contract and acted in bad faith by continually and maliciously refusing to compensate landowners for dirt extracted from their property and refusing to remove worthless trash, waste, and debris used as backfill despite the landowners' numerous complaints and the insured's assurances to honor their contract. The insured tendered the underlying suit to its commercial general liability carrier who declined to defend. The insured defended itself through trial to an adverse and substantial verdict against it. Thereafter, it filed a declaratory judgment action against its commercial general liability carrier seeking determination that its carrier breached its duty to defend.

The carrier filed a motion to dismiss asserting that it had no duty to defend the insured in the underlying lawsuit because the allegations of the landowners' complaint failed to allege "property damage" caused by an "occurrence," among other reasons. The court's analysis focused on whether the allegations in the underlying complaint alleged conduct by the insured that could be considered an accident, which was included in the subject policy's definition of an "occurrence." The court concluded the landowners' allegations that the insured intentionally and maliciously refused to pay for the removed dirt and restore the property to its previous condition could not reasonably be construed as allegations of unintentional or accidental conduct. As a result, the landowners did not allege the existence of an accident or in turn an "occurrence" and thus, the carrier had no duty to defend. Based on this determination, the court also held that the carrier had no duty to indemnify the insured for the underlying verdict. The insured appealed and that appeal remains pending.

Atain Specialty Ins. Co. v. Siegen 7 Developments, L.L.C., No. CV 18-00850-BAJ-EWD, 2019 U.S. Dist. LEXIS 152525, 2019 WL 4247827 (M.D. La. Sept. 6, 2019).

In this case, a homeowner hired the insured, a general contractor, to construct the homeowner a single family residence. Shortly after construction was completed, the residence sustained damages due to flooding. The homeowner demanded arbitration and claimed the insured improperly constructed the residence, specifically defectively constructing the lot's drainage and slope, failing to place the proper amount of grade fill material on the property and failing to achieve the minimum finish slab elevation thereby causing the floodwaters to reach the residence. As a result, the homeowner sought recovery for damage to the residence, the homeowner's personal property within the residence and the backyard. The arbitrator made a substantial award to the homeowner for damage to the residence, the personal property, and the backyard. The homeowner and insured tendered the award to the insured's carrier and argued it was obligated to indemnify the insured for the arbitrator's award under a commercial general liability policy issued to the insured. The carrier filed this declaratory judgment action seeking a declaration of no coverage.

The carrier principally maintained two arguments that coverage was precluded. First, the carrier argued the policy's "Your Product" exclusion barred coverage for flood damage to the residence because as general contractor, the residence was its product. Second, the carrier argued the Impaired Property Exclusion barred coverage for flood damage to the backyard.

The court agreed with the carrier's first argument relying on the policy's language regarding products and recent Louisiana precedent in holding that because the insured manufactured and delivered the residence, it was the insured's product irrespective of subcontractor's performing all of the work. Accordingly, the court held that part of the award relating to damage to the residence was not covered, although damage to personal property inside the residence was covered as it fell outside the ambit of the exclusion.

The court also agreed with the carrier's second argument holding the Impaired Property Exclusion barred coverage for the award for repairs to the backyard because it applied to loss of use to impaired property, such as the homeowner's backyard and the insured's defective product, the improper draining system and sloping of the yard.

Critical to both of the court's analyses and holdings was what it considered to be the insured's product under the policy. We note that the homeowner and

insured have appealed this decision and as of this publication that appeal remains pending.

JEI Sols., Inc. v. Burlington Ins. Co., No. CV 19-156, 2019 U.S. Dist. LEXIS 95068, 2019 WL 2395520 (E.D. La. June 6, 2019).

A client hired the insured contractor to renovate a building in New Orleans, but the insured subcontracted the entire scope of work to a subcontractor. Before completion of the project, the client terminated the contract with the insured and filed an arbitration demand seeking damages for faulty workmanship. The insured tendered the arbitration demand to its carrier under a CGL policy seeking defense and indemnity. The carrier denied coverage based on the lack of an "occurrence" as the arbitration demand only described the dispute as a breach of contract. The client filed an amended demand, which the insured claims it tendered to the carrier but the carrier failed to respond. Ultimately, the insured received an adverse award of $89,239, which it tendered to the carrier seeking reimbursement of defense costs and indemnity. The carrier denied again, and the insured initiated this lawsuit.

The carrier filed a motion on the pleadings asserting coverage was unavailable because 1) the awarded damages do not constitute "property damage" caused by an "occurrence;" and 2) the Damage to Property Exclusion precludes coverage. The court examined the award, which required the insured to pay for the cost to repair certain delineated items. Though it recognized in Louisiana damage to faulty workmanship is not an "occurrence," the list of damaged items included consequential property damage resulting from the insured's subcontractor's faulty workmanship. The court explained that the exclusion applies to the insured's ongoing defective work, but once the work is completed, the policy gives coverage back for property damage arising out of defective work. Ultimately, the court concluded it was not clear on the pleadings whether the damage occurred prior or subsequent to the client's termination of the contract. Thus, the court held there was a genuine issue of material fact and denied the carrier's motion.

Michigan

Skanska USA Bldg. Inc. v. M.A.P. Mech. Contractors, Inc., No. 340871, 2019 Mich. App. LEXIS 529, 2019 WL 1265078 (Mich. Ct. App. Mar. 19, 2019), *appeal granted*, 933 N.W.2d 703 (Mich. 2019).

A construction manager on a renovation project for a hospital hired a subcontractor to install a steam boiler and related piping. As a result of the subcontractor's faulty work, the heating system never functioned properly. The hospital demanded that the construction manager repair the heating system, and the construction manager sought payment from the subcontractor. The subcontractor's carrier denied coverage to the subcontractor on several grounds, including that there was no occurrence alleged and that several exclusions applied.

The carrier moved for summary disposition on two occasions, but the court denied the motions. The Court of Appeals determined that was an error because there was no occurrence alleged. The court concluded that the proper analysis "turned on evidence of the scope of the repair and replacement work as compared to the scope of the original project." Because the heating system was part of the original work, then there was no occurrence and therefore no coverage. Finally, the court determined that it was not necessary to evaluate whether any exclusions applied. Note: The Michigan Supreme Court granted leave to appeal on October 18, 2019.

Minnesota

King's Cove Marina, LLC v. Lambert Commercial Constr. LLC, No. A19-0078, 2019 Minn. App. LEXIS 389, 2019 WL 6834658 (Minn. Ct. App. Dec. 16, 2019).

A marina hired the insured to serve as the general contractor for certain renovation work. During the renovation work, the marina identified various problems with the renovations and ultimately sued the insured. The insured's carrier agreed to defend the insured, but filed a declaratory judgment action seeking a determination that there was no coverage. While the coverage action was pending, the marina and the insured entered into a *Miller-Shugart* settlement, at which point the marina started a garnishment action against the insured's carrier. The lower court had determined that the carrier owed the insured coverage for the underlying property damage action, but the appellate court reversed.

As a brief aside, a *Miller-Shugart* settlement is when an insured stipulates to a judgment against it on the

condition that the plaintiff will only agree to satisfy the judgement against the insured's insurance carrier. The name arises from the Minnesota Supreme Court's decision in *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982).

The carrier relied on various business risk exclusions, and the court ultimately concluded that Exclusion l, which excluded coverage for damages arising from the insured's own work, operated to bar coverage for at least some of the alleged damages. There was some dispute about whether the exception to the exclusion for when work is performed by a subcontractor applied. However, the court examined the *Miller-Shugart* settlement agreement and noted that the agreement was specifically limited to the work performed by the insured and was clear that the work performed by subcontractors was excluded from the agreement. Therefore, the court concluded that because the agreement failed to differentiate between the covered and uncovered damages, the agreement was unenforceable.

Missouri

Great Lakes Ins. SE v. AMCO Ins. Co., No. 4:18CV631 HEA, 2019 U.S. Dist. LEXIS 16040, 2019 WL 414736 (E.D. Mo. Feb. 1, 2019).

The insurance carrier issued a CGL policy to a subcontractor and agreed to defend it subject to a reservation of rights for an underlying dispute involving the construction of a building. Both the subcontractor and the general contractor, as an additional insured, sought coverage under the policy issued to the subcontractor. Eventually the carrier filed this declaratory judgment action, and the insured moved to dismiss the complaint. The insured argued that because the underlying lawsuit included claims for negligence, the carrier's allegations regarding lack of occurrence and business risk exclusions did not apply. The court disagreed and noted that the carrier had alleged proper causes of action and that the insured's arguments went to the ultimate issue of whether there was coverage under the policy, which it was unable to determine at the early juncture of the litigation.

Am. Family Mut. Ins. Co. S.I. v. Mid-Am. Grain Distributors, LLC, No. 2:18-CV-00051-HEA, 2019 U.S. Dist. LEXIS 66633, 2019 WL 1745786 (E.D. Mo. Apr. 17, 2019).

The insured was hired to design and construct a grain storage facility but at some point during the project, the contract was terminated. The insured filed a lawsuit against the owner, and the owner counterclaimed for breach of contract, negligence, and unjust enrichment. The insured sought coverage for the counterclaims against it under the CGL section of the policy issued by the carrier. The carrier denied coverage and filed this coverage action. The court agreed that there was no "occurrence" alleged in the counterclaim because the cause of the purported loss was the insured's negligent design and construction. The court explained that the insured's failure to perform was not an unforeseen event because it was within the insured's control. Therefore, there was no occurrence, and summary judgment was awarded to the carrier.

Montana

W. Heritage Ins. Co. v. Slopeside Condo. Ass'n, Inc., 371 F. Supp. 3d 828 (D. Mont. 2019).

A homeowners association hired the insured to install thermal systems on the roofs of buildings that would melt snow. The systems were defective and also caused additional damages. The association sued the insured, but the insured failed to defend the action. Eventually the association moved for summary judgment and put the insured's carrier on notice of the action. Meanwhile, the court in the underlying action adopted the association's proposed damages. After the insured was forwarded the entry of judgment, its carrier offered to defend the insured under a reservation of rights if the association agreed to set aside the judgment.

The association refused, so the carrier brought this declaratory judgment action seeking a determination that it did not owe coverage to the insured because there was no "occurrence" alleged by the association. The court acknowledged that the insured's installation of the thermal system was an intentional act but explained that the insured would not have been aware of the resulting damages. The court also rejected the carrier's argument that the underlying action was based in breach of contract and noted that the judgment against the insured referred to negligence.

The court concluded the Damage to Property Exclusions under j(5) and j(6) were inapplicable because the damage did not occur while the insured was working on the premises. The court denied the carrier's motion based on Exclusion l for property damage to the insured's work arising out of it and included in the

insured's completed operations because there were factual disputes about whether the damage was to the insured's work and whether the work was performed by a subcontractor. The court concluded that Exclusion (m) for property damage to impaired property that has not been physically injured was not applicable because the carrier had not identified the damages that were subject to the exclusion.

New Jersey

PJR Constr. of New Jersey, Inc. v. Valley Forge Ins. Co., No. CV174219MASLHG, 2019 U.S. Dist. LEXIS 127973, 2019 WL 3503056 (D.N.J. July 31, 2019).

The insured was hired to build a swim club, which was to be completed in three separate phases. Two years into the project, the parties terminated their agreement, and the owner made a demand for arbitration. The insured's carrier denied coverage based on Exclusions j(5) and j(6) for damages to the insured's work. The insured then filed this declaratory judgment action, but the court granted the carrier's motion for summary judgment.

The court explained that it was unnecessary to determine whether coverage was triggered in the first instance because coverage was excluded by Exclusion j(5), which barred coverage to property damages to "that particular part of real property on which [the named insured] or any contractors or subcontractors working directly or indirectly on your behalf are performing operation, if the 'property damage' arises out of those operations." Notably, the court determined that the phrase "that particular part of real property" referred to the project as a whole, so because all of the complaints against the insured were for parts of the worksite the insured was responsible for, then the exclusion applied. The insured had argued that the court should apply a subcontractor exception to the exclusion, but the court rejected the argument since the exclusion clearly did not contain any such exception.

Diaco Constr., Inc. v. Ohio Sec. Ins. Co., No. A-2717-17T3, 2019 N.J. Super. Unpub. LEXIS 1726, 2019 WL 3521933 (N.J. Super. Ct. App. Div. Aug. 2, 2019).

The insured was hired by the city to construct concrete headwalls and outlets in a local river, but lost an excavator in the water during the construction. The insured sought coverage on its first-party claim, which was paid. However, the insured then sought coverage under the liability part of its CGL policy for the cost of removing the excavator from the water. The carrier denied coverage because there was no alleged property damage. The lower court agreed that there was no coverage for several reasons including that no claim was made by the city, no property damage was alleged, and coverage was excluded by the policy's "Damage to Property" exclusion under j(5) of the policy. On appeal, the court agreed that there was no coverage because the insured could not establish any actual damage to the river or a loss of use by anyone.

New York

B Five Studio LLP v. Great Am. Ins. Co., No. 18CV01480LDHRER, 2019 U.S. Dist. LEXIS 194238, 2019 WL 5781882 (E.D.N.Y. Sept. 30, 2019).

The insured was hired to design a construction project for a condominium owners association, but ultimately received a letter from the association's attorney that the condominium units suffered leak problems due to defective design. Shortly thereafter, the insured obtained a policy from its carrier. Several months later, the insured reported a claim to its carrier, but the carrier denied coverage. After the condominium owners association filed a lawsuit against the insured, the insured filed this declaratory judgment action against the carrier. The court concluded that the prior knowledge provision in the policy was clear and unambiguous and because the insured knew of the alleged problems with the units at the time it sought coverage, there was no coverage.

Ohio

City of Cincinnati v. Metro. Design & Dev., LLC, 2019-Ohio-364, *appeal not allowed sub nom. Cincinnati v. Metro. Design & Dev., L.L.C.*, 2019-Ohio-2261, 156 Ohio St. 3d 1406, 123 N.E.3d 1041.

The insured was hired to develop houses along a particular street in a residential neighborhood. During construction of several homes, a landslide caused property damage and destabilized a hillside. The city filed a lawsuit against the insured seeking a temporary restraining order and injunction ordering the insured to stabilize the land that the insured had been developing. The insured sought coverage under its CGL policy, and ultimately filed a third-party action against its carrier.

The trial court determined that the carrier had an obligation to defend and indemnify the insured, and the appellate court agreed. Initially, the court noted that the city's complaint alleged "property damage" as defined by the policy because the complaint alleged that the insured's actions had caused damage to public infrastructure. The court also determined that Exclusion j(6) for damage to property because the insured's work was incorrectly performed on it also did not apply because some of the alleged damage was to parcels of land owned by third parties where the insured was not working.

Pennsylvania

Brayman Constr. Corp. v. Westfield Ins. Co., Inc., No. 2:18-CV-00457-MJH, 2019 U.S. Dist. LEXIS 36432, 2019 WL 1060277 (W.D. Pa. Mar. 6, 2019).

The insured subcontractor contracted with the prime contractor to furnish and deliver concrete materials that conformed to certain specifications for use on a bridge construction project. The insured's concrete ultimately failed, and the bridge columns for the pier had to be replaced at the prime contractor's expense. The prime contractor compelled arbitration. In its original demand, the prime contractor alleged the insured breached its subcontract by manufacturing and delivering defective and non-conforming concrete that caused "a failure of the placement of concrete for the drilled shafts of the bridge pier." In its amended demand, the prime contractor alleged the insured negligently designed, manufactured, and delivered the concrete and that the failure was solely a result of inadequate quality control. The insured requested defense and indemnity from its general liability carrier, who declined. The insured settled with the prime contractor and assigned its rights against its carrier, and the prime contractor filed suit against the insured's carrier.

The carrier filed a motion to dismiss asserting, among other arguments, the allegations included in the original and amended demands do not allege "property damage" caused by an "occurrence." Specifically, the carrier argued that an insured's delivery of a defective product resulting in damage to said product is akin to established Pennsylvania law holding alleged damage resulting from defective workmanship to the work product itself does not constitute an "occurrence." The court disagreed. It followed *Indalex Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 83 A.3d 418 (Pa. Super. Ct. 2013) and refused to extend this established Pennsylvania law to allegations, such as those pled by the prime contractor, which are framed in terms of product liability. Moreover, the court held the original and amended demands alleged the defective concrete caused "property damage" to something other than the concrete itself, namely the loss of use of the drilled shafts.

Nautilus Ins. Co. v. 200 Christian St. Partners, LLC, 363 F. Supp. 3d 559 (E.D. Pa. 2019).

This case concerns whether a general contractor insured's CGL carrier has a duty to defend the insured in two underlying lawsuits that relate to the insured's construction of two separate single family homes. In each lawsuit, the underlying plaintiffs alleged faulty workmanship, numerous construction defects in the homes, use of faulty materials including faulty windows that have permitted water intrusion and mushroom growth, and physical injuries, namely respiratory problems. The CGL carrier agreed to defend the insured in these lawsuits subject to a reservation of rights and filed this declaratory judgment action seeking a declaration that it did not owe the insured any duty to defend or indemnity. The carrier filed an FRCP 12(c) motion for judgment on the pleadings.

The carrier argued it had no duty to defend based on the lack of any alleged "occurrence" as required by the policy. The court acknowledged that the cost to repair or replace faulty workmanship does not constitute an "occurrence" under Pennsylvania law as "such claims simply do not present the degree of fortuity contemplated by the ordinary definition of 'accident'" included in the definition of an "occurrence." However, the court explained that a carrier will have a duty to defend its insured if the underlying allegations 1) allege faulty workmanship caused property damage to other property or bodily injury; or 2) pursuant to *Indalex Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 83 A.3d 418 (Pa. Super. Ct. 2013), if the underlying complaint maintains allegations of product defects as product defects include the possibility of an "active malfunction" causing damage or injury, which would be sufficiently fortuitous. The court rejected the carrier's arguments that *Indalex* was inapposite and opined that Pennsylvania has not adopted the "gist of the action" doctrine. The court determined that because the underlying plaintiffs alleged the insured used faulty materials such as windows that leaked and an effective moisture

barrier as well as resultant bodily injury, there is a possibility that coverage may apply for the alleged damages if proven. The carrier appealed and that appeal remains pending.

Texas

Mt. Hawley Ins. Co. v. Slay Eng'g, Texas Multi-Chem, Huser Constr., LLC, 409 F. Supp. 3d 587 (W.D. Tex. 2019).

The insured general contractors were retained by the city in connection with a municipal construction project. The city commenced suit against the contractors for alleged defects in connection with the project. The contractors' liability carrier initiated a declaratory judgment action against the contractors seeking a declaration that it did not owe them a duty to defend or indemnify in connection with the city's action based on, *inter alia*, the policy's "Breach of Contract Exclusion," which bars coverage for "any claim or 'suit' for . . . 'property damage' . . . arising directly or indirectly out of . . . [breach of express or implied contract [or] breach of express or implied warranty."

The carrier argued that there was no set of facts that would result in the contractors being liable for property damage to the city that does not arise either "directly or indirectly" out of the contractors' own breach of contract and/or breach of express or implied warranty. The contractors attempted to dispute this assertion by outlining hypothetical scenarios they believed may result in indemnity unrelated to the contract. The court, however, in analyzing these scenarios, found that, if proven, they "eliminate or minimize Defendants' [contractors'] liability to the City," and therefore "do not appear to implicate a duty to defend." The court concluded that because there was "no conceivable set of facts" in the city's action that would give rise to the carrier's indemnification obligation based on the "Breach of Contract Exclusion," the carrier had no duty to indemnify.

Utah

Cincinnati Specialty Underwriters Ins. Co. v. Green Prop. Sols. LLC, No. 1:19-CV-00010-DB, 2019 U.S. Dist. LEXIS 220161, 2019 WL 7049968 (D. Utah Dec. 23, 2019).

The customer hired the insured to blow insulation into the attic of the customer's condominium complex. After the insured completed its work, the customer filed suit against it alleging it negligently performed the blown-insulation work because its sprayed insulation blocked ventilation ports and directly caused moisture buildup and substantial water damage to the building's roof. The insured tendered the suit to its commercial general liability carrier, which denied coverage and filed a declaratory judgment action. Both the insured and the carrier moved for summary judgment.

The carrier argued it owed no duty to defend because the customer's complaint did not allege the damage resulted from an "occurrence" or accident as required by the policy. According to the court, under Utah law, property damage does not result from an accident if the damage is the "natural and probably consequence of the insured's act or should have been expected by the insured." The court held that because the alleged water damage was a direct result of the insured's own allegedly defective work blocking proper ventilation through its sprayed insulation, the alleged damage was not caused by an "occurrence." Accordingly, the court granted the carrier's motion.

Washington

Zurich Am. Ins. Co. v. Ledcor Indus. (USA) Inc., No. 76490-0-I, 2019 Wash. App. LEXIS 644, 2019 WL 1253386 (Wash. Ct. App. Mar. 18, 2019), *review denied sub nom. Zurich Am. Ins. v. Ledcor Indus. Inc.*, 193 Wash. 2d 1026, 445 P.3d 566 (2019).

This is the first of two closely connected insurance coverage appeals related to the construction of the same project. This case involves coverage disputes between a general contractor, a developer, and the general contractor's primary CGL carriers. This decision on the first appeal adjudicated issues involved in the insurance coverage dispute between the general contractor and its carriers.

The underlying dispute in this case concerns allegations of construction defects during the construction of a mixed-use condominium complex in Seattle. The building's condo-owners association filed suit against the developer claiming numerous construction defects at the building, and the developer impleaded the insured general contractor into the action. The insured tendered the lawsuit to two of its commercial general liability carriers, Carrier A and Carrier B, seeking defense and indemnity. Carrier A agreed to defend the insured subject to a reservation of rights. After two years

of litigation and a settlement, Carrier A filed a declaratory judgment action against the insured, who impleaded its other carriers.

Carrier A contended its participating policies' Residential Property Exclusion barred coverage for the underlying lawsuit. The exclusion precluded coverage for the insured's work in connection with construction of any residential building, which included multi-family structures such as condominiums as well as any other structure that is attached to the residential building. The insured argued that because the condominium complex was a mixed-use building with retail on the ground floor, it did not qualify as a residential building. The court rejected the insured's argument and affirmed the lower court's decision holding the exclusion's language was broad enough to include primarily residential buildings that include other structures such as the building in dispute. The insured also argued Carrier A engaged in bad faith for several reasons, but the court rejected all of them.

Carrier B asserted it had no duty to defend or indemnify based on the policy's progressive and continuous injury exclusion. The exclusion required Carrier B to show the alleged property damage or defect existed prior to its policy's inception, among other things. The court noted the underlying complaint was vague about when the damage commenced and described the damage as commencing at or shortly after the completion of the building but indicates that the damage may have continued thereafter. The court examined the certificate of occupancy, initiation of the sale of the condominiums, and the substantial completion date pursuant to the contract between the insured and developer. The court held that because the substantial completion date was subsequent to the inception date of Carrier B's policy, Carrier B had a duty to defend.

Zurich Am. Ins. Co. v. Ledcor Indus. (USA) Inc., No. 76405-5-I, 2019 Wash. App. LEXIS 643, 2019 WL 1245649 (Wash. Ct. App. Mar. 18, 2019), *review denied sub nom. Admiral Way, LLC v. Am. Int'l Specialty Lines Ins.*, 193 Wash. 2d 1026, 445 P.3d 566 (2019).

This is the second of two closely connected insurance coverage appeals related to the construction of the same project. This decision adjudicated motions for summary judgment filed by certain carriers against claims by the project's developer. The court's reasoning, analysis, and conclusions are either the same or substantially similar in this decision and therefore we limit the scope of our summary here to the material aspects of the court's analysis with respect to the developer's tender for additional insured coverage under Carrier B's policy.

The court determined the developer qualified as an additional insured under both endorsements to Carrier B's policy affording additional insured coverage. Under the policy's "Commercial General Liability Broadened Coverage" endorsement, the court found that the developer qualified as an additional insured because the insured general contractor was required to add the developer as an additional insured on its policy pursuant to the parties' written contract. Under the policy's additional insured endorsement, a company qualifies as an additional insured if required by written contract and evidenced by a certificate of insurance. The court held the developer satisfied the first prong of the additional insured endorsement and the developer's proffered certificate of insurance listing its managing member and the address of the project was sufficient to satisfy the second prong. The court looked to information extrinsic to the complaint relying on Washington's exception to the eight-corners rule obligating a carrier to investigate and give an insured the benefit of the doubt if it is unclear whether the policy provides coverage based on the face of the complaint. Lastly, the court denied Carrier B's motion for summary judgment with respect to the developer's bad faith claims based on the developer's likely status as an additional insured and potentially unreasonable failure to investigate the developer's additional insured claim and purportedly applicable exclusions.

Wisconsin

Crum & Forster Specialty Ins. Co. v. DVO, Inc., 939 F.3d 852 (7th Cir. 2019).

The insured and a customer entered into a Standard Form Agreement under which the insured agreed to design and build an anaerobic digester, but the customer later sued the insured for breach of contract alleging it failed to properly design substantial portions of the completed anaerobic digester and sought significant damages and fees. The insured tendered the suit to its carrier under its errors and omissions professional liability coverage. The carrier initially provided the insured with a defense subject to a reservation of rights,

but it withdrew from the defense shortly thereafter. The insured was ultimately found liable for damages in the underlying suit and subsequently brought an action against its E&O carrier.

The E&O professional liability policy provided coverage for sums the insured is required to pay as damages because of a "wrongful act." The E&O coverage also contained a Breach of Contract Exclusion, which precluded coverage for claims "based on or arising out of a breach of contract." The court denied the carrier's motion for summary judgment in which the carrier asserted that the breach of contract exclusion barred coverage for the customer's suit and held the E&O coverage was illusory because the exclusion swallowed the coverage grant. Critical to the court's holding was the exclusion's use of the phrase "arising out of," which led the court to conclude that a professional malpractice claim necessarily involves a contractual relationship. Moreover, according to the court, the expansive language of the exclusion extended to third-party professional negligence claims, as well because such claims would somehow have to arise out of an express or implied contract. Because the Breach of Contract Exclusion was at least as broad as the E&O coverage grant, coverage was illusory and reformation and the appropriate relief to give effect to the reasonable expectations of the insured. ■

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