MEALEY'S® LITIGATION REPORT

Construction Defects Insurance

Construction Defect Claims: A 2020 Update Part I

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A commentary article reprinted from the November 2020 issue of Mealey's Litigation Report: Construction Defects Insurance

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Commentary

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[Editor's Note: Thomas F. Segalla and Michael T. Glascott are partners and Ashlyn M. Capote, Adam R. Durst, Sean P. Hvisdas, and Jason E. Rusche are associates at Goldberg Segalla LLP. Any commentary or opinions do not reflect the opinions of Goldberg Segalla LLP or LexisNexis®, Mealey Publications™. Copyright © 2020 Thomas F. Segalla, Michael T. Glascott, Ashlyn M. Capote, Adam R. Durst and Jason R. Ruche. Responses are welcome.]

Introduction

There are certain general principles in the realm of insurance coverage for construction defect claims that can be applied almost universally across jurisdictions, such as the concept that commercial general liability policies are meant to provide coverage for accidents rather than transform the coverage so that the insurer is essentially a surety for the insured's construction work. Various cases discussed below reiterate this point in their analyses of both trigger of coverage and the application of various "business risk" exclusions. Relatedly, central to courts' analyses is whether the action against the insured seeks damages to the insured's own work product or damages to some other property.

However, one area where the law continues to evolve as more courts confront the issue is whether actions against an insured regarding its work product have alleged an "occurrence" even where the work was actually performed by a subcontractor. On the one hand, some courts say that there is no occurrence because the alleged damage is limited to the insured's work product. On the other hand, a court may determine that because the policy's Damage to York Work contains an exception for work performed by a subcontractor, there must have been an occurrence in the first instance, or the exception would be meaningless." Contrast *Mt. Hawley Ins. Co. v. Huser Constr. Co.*, with the Michigan Supreme Court's decision in *Skanska United States Bldg. v. M.A.P. Mech. Contrs.*

Both of these cases, along with various construction defect insurance coverage decisions from the first half of 2020, are discussed below. 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 2020.

Alabama

Barton v. Nationwide Mut. Fire Ins. Co., No.: 2:17-CV-618-RDP, 2020 U.S. Dist. LEXIS 25943 (N.D. Ala. Feb. 14, 2020).

Definition of an "Occurrence" and the Damage To Your Work Exclusion

Underlying plaintiffs, homeowners, hired the insured general contractor to construct a single family home. The insured acted as general contractor on the project and hired subcontractors to perform the construction

work. The plaintiffs closed on the home in 2006 and shortly after identified construction deficiencies, which they communicated to the insured. Notwithstanding, the plaintiffs moved into the home in 2006. Upon moving into the home, the plaintiffs observed additional construction defects as well as water intrusion into the home primarily through certain windows, including dormer windows in the attic, and certain parts of the roof. The insured performed repairs to the dormer windows, but water intrusion and resulting damage continued. Subsequently, the plaintiffs retained home inspection contractors who identified additional construction defects, resulting in water damage to the property, and mold growth necessitating, among other things, replacement of the roof. In 2011, the plaintiff filed an underlying state court action against the insured. The insured's CGL insurer initially defended the insured, but it withdrew the defense in 2012 and the insured did not defend itself. As a result, the homeowners ultimately secured a $900,000 judgment against the insured.

The homeowners then filed suit against the insured's CGL insurer as a judgment creditor seeking satisfaction of their judgment under the CGL policies. The insurer filed a motion for summary judgment in which it advanced numerous coverage defenses, including that the insured's defective construction work did not constitute an "occurrence" under the relevant CGL policies and that the policies' Damage To Your Work Exclusion precluded coverage. The court observed that under Alabama law, whether faulty workmanship constitutes an "occurrence" under a CGL policy generally depends on the nature of the damage that resulted from the faulty workmanship. To the extent the faulty workmanship caused damage to other property, the faulty workmanship could constitute an "occurrence." The court held that based on its review of the record, at least some damage caused by the faulty workmanship could be considered an "occurrence" and was not barred by the Damage To Your Work Exclusion. Moreover, at least with respect to the insurer's 2006 and 2007 policies, the subcontractor exception to the Damage To Your Work Exclusion applied, restoring coverage that might have been precluded by this exclusion.

California

Mesa Underwriters Specialty Ins. Co. v. HYDS, Inc., No. CV 19-5792 PA (SKx), 2020 U.S. Dist. LEXIS 86038 (C.D. Cal. May 14, 2020).

Defective Workmanship Does Not Constitute "Property Damage" or an "Occurrence"

The insured was in the business of importing and distributing stone and tile products and was retained by a contractor to provide countertops and tile for one project and just tile for a second project. For the first project, the contractor was required to seek another vendor for the countertops and tile given the insured's failure to deliver them in a timely fashion. For the second project, the insured delivered defective tile, which the contractor had to subsequently demolish and remove after it was installed. The contractor thereafter sued the insured for the economic losses it sustained from having to procure materials from alternate vendors, as well as delay costs, overtime charges, etc.

The insured's commercial general liability insurer disclaimed coverage for the lawsuit on the basis the suit did not allege "property damage" or an "occurrence," and based on the Damage To Your Product Exclusion and Impaired Property Exclusion. The insurer then commenced a declaratory judgment action seeking to confirm its disclaimer. The court agreed with the insurer, finding that, as to the first project, the underlying action failed to allege "property damage" or an "occurrence," and was otherwise barred by Impaired Property Exclusion. For the second project, the underlying action did not allege property damage resulting from an "occurrence," and was otherwise excluded by both the Damage To Your Product and Impaired Property Exclusions. The court held that "under California law, commercial general liability policies like the Policy 'are not designed to provide contractors and developers with coverage against claims their work is inferior or defective.'"

Liberty Mut. Fire Ins. Co. v. Bosa Dev. Cal. II, Inc., No. 17-cv-0666-AJB-BGS, 2020 U.S. Dist. LEXIS 65243 (S.D. Cal. Apr. 9, 2020).

Multiple Occurrences

The insured was a developer for a condominium project, and it hired several subcontractors to perform work on the project. The condominium association thereafter provided notice to the insured of various construction and engineering defects at the condominium, including: (1) defective exterior work and waterproofing that resulted in water damages; (2) improper

plumbing that resulted in leaks and sewage backups; and (3) improper selection of piping and dryer-vent systems. The association commenced suit against the developer seeking damages for the alleged defects, and the developer filed a cross-complaint against various subcontractors for damages allegedly sustained as a result of the defective work. The developer and subcontractors were covered under a single wrap-up policy. The insurer agreed to defend the developer and subcontractors in connection with the suit by the association under the wrap-up policy.

The insurer originally determined there were as many as 12 claims comprising 11 occurrences, triggering 11 separate deductibles of up to $500,000 each, which were charged to the developer. The developer disputed the insurer's position, asserting it was only liable for one deductible. The court was tasked with applying California's "causation test" to determine the number of occurrences under the policy. The "causation test states that the number of occurrences under an insurance policy depends on the cause of injury rather than the number of injurious effects or harms." Applying the test, the court found that there were three separate occurrences applicable to the loss, one applicable to each set of defective work referenced above, i.e., one for the defective exterior work, one for the improper plumbing, and one for the improper selection of piping. The court rejected the developer's argument that its alleged negligent supervision of the project, which resulted in the aforementioned defects at the property, justified the application of a single occurrence.

Colorado

Rocky Mt. Prestess, LLC v. Liberty Mut. Fire Ins. Co., 960 F.3d 1255 (10th Cir. 2020).

Faulty Workmanship Exclusion

The owner of a property hired a general contractor to build an office building and purchased an all-risk builder's risk policy to cover the project. The general contractor hired a subcontractor to perform precast concrete construction work, including grout work. After the subcontractor began installing precast pillars, the general contractor asked it to hire a third-party engineering firm to conduct a peer review of the work because of issues with the subcontractor's work that arose on an unrelated project. The engineering consultant identified 264 faulty joints that required repairs. No other structural defects or resulting damage were identified. The builder's risk insurer denied coverage on multiple grounds, including the Faulty Workmanship Exclusion. The subcontractor sued seeking coverage. The district court granted the insurer's motion for summary judgment on three grounds, including the applicability of the Faulty Workmanship Exclusion.

The policy's Faulty Workmanship Exclusion precluded coverage for damage resulting from faulty or defective workmanship or materials. This exclusion included an ensuing loss exception provision that restored coverage if the faulty workmanship caused a covered peril that in turn resulted in loss or damage to covered property. The subcontractor argued that because the policy defines a "covered peril" as a risk of loss not excluded, the policy language was circular, inconsistent, and ambiguous, rendering the exclusion unenforceable and requiring the court to conclude the cost to repair the grout in the faulty joints covered. The court rejected this argument given the extensive amount of case law enforcing this exact exclusion or exclusions with substantially similar wording. It observed that although there are several lines of cases that articulate varying analytical criteria, the cases were consistent in holding that the exclusion is enforceable and on one overarching principle: the exception cannot be allowed to swallow the exclusion. Thus, the court determined that the ensuing loss exception did not restore coverage for the cost of repairing or replacing the defective property itself and the subcontractor asserted no reasonable basis why it would. The lower court's decision was affirmed.

Florida

Glass-On Solutions, Inc. v. Blackboard U.S. Holdings, Inc., No. 19-14027-CIV-MARRA/MAYNARD, 2020 U.S. Dist. LEXIS 73711 (S.D. Fla. Apr. 24, 2020).

Damage to Property Outside the Scope of Work is Covered

The insured was hired to apply a protective sealant to certain surfaces of the plaintiff's home, including marble floors, terrace floors, marble countertops, brass thresholds, and baseboards. The homeowner alleged the insured's work was defective and caused her damages, including damage to property that was within the scope of work she hired the insured to do, and

damage to "other property" that was outside the scope of the insured's work, including damage to her television and fireplace. The homeowner sued the insured for breach of contract and breach of warranty.

The insured's commercial general liability insurer denied any obligation to defend or indemnify the insured in connection with the suit, causing the insured to commence a declaratory judgment action seeking both defense and indemnification in connection with the homeowner's action. The insurer argued that, generally, CGL policies can never cover claims for defective workmanship, rendering its denial proper. The court, however, rejected this general assertion, and instead applied the language of the policy, including its exclusionary provisions, to the allegations in the underlying complaint. In doing so, the court found the insurer had a duty to defend because the underlying complaint alleged "property damage" caused by an "occurrence," and included allegations of "secondary 'other' property damage that results from the insured's work," thus taking it outside the CGL policy's standard "business risk" exclusion (i.e., the Damage to Property, Damage to Your Work, and Impaired Property Exclusions).

Practice Point: Florida does not have a general prohibition of coverage for claims arising out of faulty workmanship, so be sure to apply the policy language to the allegations of the complaint when determining coverage.

Southern-Owners Ins. Co. v. MAC Contrs. of Fla., LLC, 437 F. Supp. 3d 1094 (S.D. Fla. Jan. 29, 2020).

Repairs to Faulty Workmanship Not Covered "Property Damage"

The insured was a general contractor retained by two individuals to build a residence in Marco Island, Florida. The insured did not obtain substantial completion of the project and either abandoned the construction or was terminated by the homeowners. The homeowners thereafter sued the insured for breach of contract based on 86 defects that were caused by the insured's or its subcontractors' work. The insured, however, asserted the defects were simply punch-list items. The insured tendered the suit to its general liability insurer, which initially agreed to defend the insured. However, it withdrew its defense and denied coverage for the suit on the basis that a breach of contract claim was not within the scope of coverage, and that the underlying action was otherwise excluded by the policy's Damage To Your Work Exclusion, the Contractual Liability Exclusion, and the Damage To Property Exclusion (i.e., exclusions j(6) and j(7)). The insurer thereafter commenced a declaratory judgment action seeking to confirm the basis of its disclaimer.

The court agreed with the insurer's position and found the insurer did not owe the insured defense or indemnification in connection with the homeowners' suit. The court concluded that the underlying complaint did not contain any allegations of "damage beyond the faulty workmanship or defective work which damaged otherwise non-defective components of the project" and thus failed to allege any covered "property damage." The court held the insurer did not owe a duty to defend.

Liberty Mut. Fire Ins. Co. v. Southern-Owners Ins. Co., No. 18-81018-Civ-Brannon, 2020 U.S. Dist. LEXIS 12757 (S.D. Fla. Jan. 24, 2020).

OCIP Exclusion Applies to Additional Insured

A roofing subcontractor was seeking additional insured coverage under a commercial general liability policy issued to its sub-subcontractor in connection with an action arising out of defective workmanship at a construction project for the development of a condominium. The underlying action alleged several claims against the subcontractor and sub-subcontractor, including negligence and breach of warranties. The subcontractor was being defended by the general contractor's insurer, which provided a Contractor Controlled Insurance Program ("CCIP") for the project. The general contractor's insurer thereafter tendered coverage to the sub-subcontractor's insurer. The sub-subcontractor's insurer also agreed to defend the subcontractor, subject to a reservation of rights, though later claiming "[t]here may not be coverage if there was any Consolidated Insurance Program in place" relying on the policy's OCIP exclusion.

The general contractor's insurer commenced suit against the sub-subcontractor's insurer seeking reimbursement for fees and costs incurred in the defense of the subcontractor. The sub-subcontractor's insurer denied any such obligation on the basis the OCIP exclusion barred coverage for the subcontractor. The

general contractor's insurer argued the OCIP exclusion was inapplicable because the sub-subcontractor was not within the scope of the CCIP. The court disagreed, finding that the OCIP exclusion extends beyond its named insured to its additional insureds, in that it applies to all "'property damage' arising out of [the sub-subcontractor's] ongoing operations . . . for which a consolidated (wrap-up) insurance program has been provided. . .." As a result, the subcontractor was not entitled to additional insured coverage under the sub-subcontractor's policy.

Georgia

Evanston Ins. Co. v. DCM Contractors, Inc., 441 F. Supp. 3d 1336 (N.D. Ga. 2020).

A property owner hired the insured contractor to construct a building, but the property owner subsequently identified construction defects in the project. In August 2017, the underlying property owner sent a demand letter to the insured claiming faulty workmanship at the project. In December 2017, the property owner filed suit against the insured alleging the building was constructed in a faulty manner, among other claims. In May 2018, the insured's CGL insurer received notice of the suit. The insurer denied coverage and filed this declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the insured for the underlying suit because the suit did not allege "property damage" resulting from an "occurrence," the insured failed to comply with the policy's notice condition, and coverage was precluded by various exclusions. The insurer moved for summary judgment.

The court granted the insurer's motion holding that the suit did not allege property damage resulting from an "occurrence" and because the insured's breach of the notice provision would forfeit coverage anyway. The underlying property owner's suit sought damages for repair of the insured's work and economic damages. The court observed that the purpose of CGL policies is to cover an insured for liabilities arising from an insured's mistake that causes damage to property and does not operate to guarantee an insured's shoddy workmanship. In Georgia, a claim for repairing or replacing an insured's defective work because of the insured's own defective workmanship is not covered by a CGL policy. Moreover, here the insurer's policy included an amendment to the standard definition of "occurrence" that expressly stated that an occurrence was "'property damage' resulting from faulty workmanship, exclusive of the faulty workmanship itself." In addition, the policy required the insured to notify the insurer of the underlying claim "as soon as practicable," but the insured waited nine months before it first notified the insurer of the claim. The court concluded that as a matter of law, the nine-month delay constituted a breach of the notice condition and a failure by the insured to satisfy a condition precedent of coverage. Thus, the insured had forfeited any coverage that might have been available.

Hawaii

North River Ins. Co. v. HK Const. Corp., No. 19-cv-00199-DKW-KJM, 2020 U.S. Dist. LEXIS 90110 (D. Ha. May 22, 2020).

Earth Movement Exclusion

In 2017, customers hired the insured, a builder, to construct a new residence and improvements on their property located in Hawaii. In order to build a retaining wall, the insured excavated near the property line. The insured's excavation work allegedly dislodged soils causing the slope of the adjoining neighbor's property to fail and resulting in significant erosion and damage to a stone wall and drainage easement. This occurred while the adjoining property owner was selling his property and it was in escrow. After the "landslide," the prospective buyer declined to purchase the adjoining property. The adjoining property owner ultimately filed suit against the insured claiming negligence and seeking recovery of damages, including the cost to remediate the damage to its property. The builder's CGL insurer defended the insured in the suit subject to a full reservation of rights and commenced this declaratory judgment action contending it had no duty to defend because the policy's Earth Movement Exclusion operated as a complete bar to coverage.

The insurer moved for summary judgment based on the applicability of the exclusion, claiming it applied to any damage caused by earth movement, including subsidence, which resulted from a natural phenomenon, the insured's work, product, or operations, or any combination thereof. The insured claimed that the exclusion only applied to preclude coverage for damage caused by earth movement that resulted from a natural phenomenon. The court held the policy's Earth Movement Exclusion was unambiguous and agreed with the

insurer that the exclusion expressly states that it applies to damage from earth movement caused by any combination of natural phenomenon and the insured's work, thereby operating to bar coverage for the underlying suit. The court also rejected the insured's arguments for coverage by estoppel for several reasons, including that the insured did not show that it suffered prejudice. The court distinguished cases cited by the insured that found a different Earth Movement Exclusion ambiguous because that exclusion only excluded natural phenomenon (e.g., earthquake, sinkholes). The court granted the insurer's motion for summary judgment.

Illinois

Lexington Ins. Co. v. Chi. Flameproof & Wood Specialties Corp., 950 F.3d 976 (7th Cir. 2020).

No Occurrence, Notwithstanding Allegations of Negligence

The insured was a distributor of commercial building materials, including fire retardant and treated lumber, and it sold materials to Minnesota-based residential and commercial contractors for various projects. The contractors required that the lumber they were purchasing for the projects be compliant with the International Building Code (IBC). Notwithstanding, the contractors allege that the insured "knew or should have known" the lumber actually supplied for the projects was not compliant with the IBC, and that the insured "concealed" that the lumber had not been tested pursuant to IBC requirements. The contractors sued the insured for negligent misrepresentation, fraudulent misrepresentation, deceptive business practices, false advertising, consumer fraud, breach of warranties, and breach of contract, seeking damages for the costs of removing and replacing the lumber at the projects.

The insured's general liability insurer commenced a declaratory judgment action seeking a declaration that it owed no coverage in connection with the suits by the contractors, arguing the suits did not allege a covered "occurrence." The insured, however, argued that the insured's shipment of lumber and the requirement that the lumber be torn out of the walls at the projects constituted occurrences that caused property damage, triggering coverage. The court sided by with the insurer, finding that the suits by the contractors did not allege a covered "occurrence" because the insured made the unilateral decision to ship lumber to the contractors that was not compliant with the IBC. Notably, the court rendered this decision, notwithstanding the allegations of negligent misrepresentation, since the claim stemmed exclusively from the insured's "deliberate decision to supply, and conceal that it had supplied, uncertified lumber."

Louisiana

Shepherd v. Sec. Nat'l Ins. Co., No. 19-2322, 2020 U.S. Dist. LEXIS 18645 (E.D. La. Feb. 4, 2020).

Uncertain Contractual Scope of Work Precludes Summary Judgment

The plaintiff sued a contractor and the home improvement store that had referred the plaintiff to the contractor for extensive damage to the interior and exterior of the property caused by the contractor. The plaintiff also named the contractor's insurer for violations of La. R.S. 22:1892 and 22:1973, which govern insurers' claims adjustment policies and good faith duties. The contractor began work on the property five days before the end of the policy period.

The insurer moved for summary judgment, arguing that the damage to the property took place after the end of the policy period and that the commercial general liability policy's "business risk" exclusions preclude coverage. Specifically, the insurer argued that the policy excludes coverage for "[t]hat particular part of real property on which you . . . are performing operation, if the 'property damage' arises out of those operations" or "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it."

The court rejected both arguments, noting that disputes of material fact precluded summary judgment for the insurer on both issues. With regard to the applicability of the exclusions, the court noted that the plaintiff asserted that she did not contract with the contractor for work on certain areas of the property that suffered damage. Because the summary judgment record did not include sufficient evidence to establish the specific terms of the contractual relationship, the court denied the insurer's motion.

Gibbs Constr., L.L.C. v. Nat'l Rice Mill, L.L.C., 294 So. 3d 552 (La. App. 4 Cir 2020).

Economic Damages may be Property Damage when Physical Damage is Alleged

The Louisiana Fourth District Court of Appeals held that a lower court improperly granted summary judgment in favor of an excess insurer based on a faulty workmanship case. The action alleged that the insured, a masonry contractor, improperly performed masonry renovation during the renovation of a building into luxury apartments causing a large amount of damages.

The excess insurer and another party's primary commercial general liability insurer sought summary judgment, asserting that claims for management fees, damage to "your work," delay damages or reduction in contract price by liquidated damages, rent concessions, loss of business reputation, and mold remediation do not constitute "property damages" under the respective policies.

In an apparent case of first impression for a Louisiana appellate court, the court considered whether "property damage" could apply to claims sounding in contract, in addition to tort. The insurers asserted that policy language "legally obligated to pay as damages" applies only to tort-based obligations, and not contract-based claims such as contract price and delay damages. Further, the insurers argued that damages such as rent concessions, lost income, and damage to business reputation do not constitute "property damage." The court disagreed and distinguished cases finding that contractual or economic damages were not property damage, noting that in those cases the party seeking coverage did not allege a physical injury or destruction to tangible property. Thus, the court found that a complaint that includes mixed allegations of property damage and economic or contractual damages triggers the policy's initial grant of coverage.

Anderson v. Laborde Constr. Indus., L.L.C., 2020 La. App. LEXIS 425 (La. Ct. App. 1st Cir. 2020).

Insurer Owed Additional Insured Coverage under Policy that Incepted after Termination from Project

Plaintiffs, unit owners in a multi-unit housing development, filed a construction defect suit against the development's owner, general contractor, the subcontractor, other construction defendants, and several insurers. The general contractor retained the subcontractor to perform site work and pile driving, and, in turn, the subcontractor retained several sub-subcontractors that named the subcontractor as additional insured on their policies of insurance.

The general contractor terminated the subcontractor before one of the sub-subcontractor's policies took effect, but the sub-subcontractor named the subcontractor as an additional insured on the policy. The subcontractor sought defense and indemnification from the sub-subcontractor's insurer despite the fact that the subcontractor was no longer working on the project when the policy came into effect.

The insurer moved for summary judgment, generally arguing that because the general contractor terminated the subcontractor before the inception of the policy, the insurer could have no duty to defend or indemnify the subcontractor. The trial court granted the motion and dismissed other insurers' third-party claims and claims by the subcontractor and sub-subcontractor against the moving insurer.

The parties whose claims the trial court dismissed appealed. The appellate court, however, reversed the trial court's decision. It explained that Louisiana generally applies the manifestation trigger theory of coverage for third-party claims for construction defects, including claims for emotional distress damages as a result of construction defects. Because under the manifestation trigger theory, coverage is triggered when the damage manifests itself during the policy period, the court explained that the defective construction itself does not trigger coverage, but the manifestation of the damage caused by the construction defect triggers coverage. The court found a question of material fact regarding when the damage manifested and reversed the trial court's grant of summary judgment.

Michigan

Cardinal Fabricating v. Cincinnati Ins. Co., No. 348339, 2020 Mich. App. LEXIS 3912 (Mich. Ct. App. June 18, 2020).

Impaired Property Exclusion

The insurer issued CGL and umbrella policies to an entity that fabricated steel. The insured was sued in an underlying lawsuit involving alleged damage to a visual screen at an airport runway. The allegation against the

insured was that defects in the steel material compromised the integrity of the structure, so when the support columns cracked, there was damage to the screen and the concrete base.

The insurer denied coverage because it asserted that there were no damages sought as a result of an occurrence, and the insured filed this lawsuit. The insured moved for summary disposition regarding the duty to defend, and the insurer responded that there was no occurrence and raised the Impaired Property Exclusion. The lower court concluded that the insurer did have a duty to defend, and this appeal followed.

Initially, the court concluded that it was not the insured's burden to demonstrate that coverage was triggered, i.e., that an occurrence had been alleged. The court explained that damage to the insured's own work product is not an occurrence, but damage to other property may be. It examined the underlying complaint and concluded that there were allegations that the defective steel had caused damage to the screen and concrete pads, which was outside the purview of the insured's work.

The court also concluded that the insurer had waived relying on the Impaired Property Exclusion because the insurer had not clearly relied on it in its denial letter or in its affirmative defenses in the coverage action. The court explained that general language reserving rights does not constitute compliance with the insurer's obligation to provide notice of specific coverage defenses. Regardless, the court determined that the exclusion did not apply because the exclusion applied to property that had not been physically damaged, and the underlying action clearly sought damages for property that had been physically damaged.

Practice Point: The determination regarding whether there was an occurrence typically involves analysis of the specific items of damage for which the insured is allegedly responsible and whether each item of damages was part of the insured's work.

Skanska United States Bldg. v. M.A.P. Mech. Contrs., Nos. 159510-159511, 2020 Mich. LEXIS 1194 (Mich. June 29, 2020).

Analysis of the Impact of the Subcontractor Exception within Damage to Your Work Exclusion on the Occurrence Trigger of Coverage

A construction manager sued the insured, one of its subcontractors, alleging that the subcontractor had incorrectly installed heating joints within the heating system. The construction manager alleged that it had incurred costs associated with repairs to the heating system. The construction manager also sued the insured's CGL insurer seeking coverage as an additional insured under the subcontractor's CGL policy.

The insurer moved for summary disposition on the basis that there was no occurrence, and the trial court denied the motion. The Michigan Court of Appeals reversed the decision and concluded that there was no occurrence because the only damage was to the insured's own work product.

The Michigan Supreme Court ultimately reversed the appellate court decision and determined that coverage was owed to the construction manager because the work was performed by its subcontractor. The court analyzed the Michigan Court of Appeals decision in *Hawkeye-Security Ins. Co. v. Vector Constr. Co.*, N.W.2d 329 (Mich. App. 1990) and explained that a different version of the standard ISO policy was involved in that case. Specifically, the Damage to Your Work Exclusion had since been amended to include an exception for when property damage to the insured's work is performed by a subcontractor.

The court explained that if defective workmanship by a subcontractor was not an occurrence, then there would be no purpose to the subcontractor exception within the Damage to Your Work Exclusion. The court analyzed the history of case law determining that defective workmanship claims did not allege any occurrence and specifically rejected the New Jersey Supreme Court decision in *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788 (N.J. 1979). With respect to the *Hawkeye* decision, the court held that the decision was limited to "cases involving the pre-1986 CGL policy language."

Missouri

Am. Family Mut. Ins. Co. v. Mid-American Grain Distribs., LLC, 958 F.3d 748 (8th Cir. 2020).

Definition of an "Occurrence"

A customer entered into an oral contract with the insured in which the insured agreed to design and construct a grain storage and distribution facility. After just

over a year on the project, the customer terminated the contract and fired the insured from the project. The insured filed suit against the customer for breach of contract, and the customer asserted a counterclaim against the insured alleging, *inter alia*, the insured performed shoddy work, including a multitude of design and construction errors. The insured tendered the counterclaim to its CGL insurer. The insurer agreed to defend under a reservation of rights and subsequently filed this declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the insured against the customer's counterclaim in the underlying lawsuit, because, *inter alia*, the customer did not allege that the insured's negligent work caused property damage resulting from an "occurrence." The insurer moved for summary judgment on this basis, and the district court granted its motion. The insured appealed to the Eight Circuit.

The Eighth Circuit noted that the Missouri Supreme Court had not yet handed down a controlling decision on this issue as of the time Eighth Circuit reached its decision. The policy defined an "occurrence" as an "accident." Missouri courts have interpreted the term "accident" in accordance with the ordinary dictionary definition, which does not include something that is foreseeable or intentional. Although it is unclear under Missouri law whether foreseeability should be considered objectively or subjectively from the insured's perspective, the court concluded from its examination of Missouri cases that foreseeability can be inferred as a matter of law based on the "nature and character of the act" and the type of damages at issue, ascribing an objective standard. It further concluded that the cost to repair or replace a contractor's shoddy work was a normal and expected consequence and thus a foreseeable one. Accordingly, the court determined that an insured's shoddy work that requires the repair or replacement of such work does not constitute an accident or an "occurrence" under the language of the CGL policy at issue in this case. The court found further support for its reasoning and conclusion in Missouri courts' recognition that CGL policies are not designed to guarantee the work of the insured. Here, because the customer's claimed damages, such as costs to investigate, identify, and remediate the insured's faulty workmanship as well as lost profits, all arose from the alleged multitude of the insured's design and construction errors at the project—the underlying counterclaim did not allege damage resulting from an "occurrence." As such, the court affirmed.

New Jersey

Travelers Lloyds Ins. Co. v Rigid Global Bldgs., LLC, No. 18-5814, 2020 US Dist LEXIS 25759 (D.N.J. Feb.13, 2020).

Continuous Trigger Inapplicable when Damages Do Not Occur During the Policy Period

A tennis center contracted for the construction of indoor tennis courts and worked with a designer that hired the insured contractor to manufacture a pre-engineered metal building for the center. After the tennis center opened, it began to suffer water leaks, particularly after Hurricane Irene and Superstorm Sandy, and then suffered a partial roof collapse after a snowstorm. The tennis center filed suit against various contractors, including the insured contractor, alleging that the insured contractor failed to design the roof to sustain minimum-required loads. The case went to trial, and the jury found the insured contractor liable.

The insured contractor's insurer issued two consecutive commercial general liability policies to the insured contractor that were effective until six months before Hurricane Irene struck the tennis center. The insurer filed suit, seeking a declaration that it had no duty to defend or indemnify the insured contractor because no property damage "occurred" during an applicable policy period.

The insurer argued that no "occurrence" took place during insurer's policy periods. The federal district court cited the New Jersey Supreme Court, which noted "the time of the 'occurrence' of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining party was actually damaged." The court agreed, noting that the underlying trial court barred the tennis center from introducing evidence of damage during the time that the insurer's policy was in effect. Thus, the jury could only award a verdict against the insured contractor for the damages the tennis center sustained in the partial roof collapse.

Similarly, the court considered whether the continuous trigger theory triggered coverage. Under the continuous trigger theory, progressive property damage is deemed to trigger each policy in effect until a reasonable person discovers or should have discovered the property damage. The court, however, disagreed that the continuous trigger theory affected its conclusions because

the underlying trial court precluded the tennis center from introducing evidence that the tennis center suffered property damage during the insurer's policy periods. The court concluded that the fact that no damages could be allocated to the insurer's policy periods demonstrates that there is no basis for coverage.

Ten W. Apparel v. Mueser Rutledge Consulting Eng'rs, No. A-1756-18T3, 2020 N.J. Super. Unpub. LEXIS 418 (N.J. Super. Ct. App. Div. Feb. 28, 2020).

Earth Movement Exclusion Bars Coverage for Warehouse

A warehouse owner sought coverage for property damage caused during the soil remediation of a contaminated industrial site adjacent to the warehouse's property. Before the soil remediation occurred, an inspection of the warehouse revealed a sloping and cracked concrete floor and cracks in the warehouse wall. As part of the remediation, a contractor installed sheet piles, which are large metal fences that are driven into the ground around the perimeter of an excavation site to shore up the site walls and prevent the surrounding soils from collapsing. On the fourth day of sheet pile installation, a warehouse manager felt the building shake and saw a crack develop on the northeast wall. An expert retained by the warehouse opined that the pile driving caused a differential settlement of the soil beneath the northeast end of the warehouse, causing an imbalance in the warehouse's foundation and an expansion of the preexisting cracks along the northeast wall. The expert also opined that the contractor drove the sheet piles too close to the warehouse's eastern wall and that vibrations caused the roof's membrane to crack.

The warehouse owner sought coverage from its first-party property insurer. The insurer denied coverage based upon an Earth Movement Exclusion in its policy and the conclusions of the warehouse owner's expert's conclusions. The policy also contained exclusions for deterioration, wear and tear, and faulty workmanship.

The warehouse owner filed suit against several parties related to the remediation and its first-party insurer. With regard to the insurer, the warehouse owner argued that that was a distinction between exacerbations of existing cracks caused by the sheet pile installation versus cracks caused by differential soil settlement, arguing that the cause of the damage may impact the availability of coverage. The trial court and appellate division held that the cause of the damages, and specifically, whether the damages were caused by deferred maintenance or faulty workmanship during the sheet pile installation, was irrelevant. The insurer's policy excluded damages caused by soil movement, which the court explained defeated the claims for damages caused by the sheet pile installation, while claims for damages relate to exacerbated cracks falls under a Wear and Tear Exclusion and Faulty Workmanship Exclusion. The court concluded that the warehouse owner's attempts to differentiate the damages from being caused by the soil movement or by the sheet pile installation was a distinction without a difference for purposes of coverage.

New York

RD Rice Constr., Inc. v. RLI Ins. Co., No. 651185/2015, 2020 N.Y. Misc. LEXIS 1991 (N.Y. Sup. Ct. May 7, 2020).

Breach of Contract Exclusion

The plaintiff in the coverage dispute was an insurer that had issued a homeowners policy to homeowners, paid its policyholder claims following property damage at the home, and then filed a subrogation action against the general contractor. The general contractor had been tasked with construction and renovation work at the home but following complaints from the homeowners, the general contractor had to return to the property to install additional insulation, which ultimately resulted in a water loss.

In the subrogation action, the homeowners' insurer obtained a judgment against the general contractor and then filed a lawsuit against the general contractor's insurer. The general contractor's insurer had disclaimed coverage to the general contractor because the lawsuit against the general contractor was for warranty work and therefore did not allege any occurrence. It also disclaimed coverage based on various policy exclusions.

In competing motions for summary judgment, the homeowners' insurer contended that it was not seeking any damages for the general contractor's actual work product and was instead only seeking recovery for the damages caused as a result of the water loss. The general contractor's insurer acknowledged that there was some damage to a rug as a result of the water loss but contended that the judgment obtained against the general

contractor was for the insured's own work rather than any resulting damages.

In its decision, the court analyzed various New York decisions determining that CGL insurers are not designed to act as sureties of their policyholders' work product. The court concluded that except for the damage to the rug, there were no damages resulting from an occurrence.

The court also analyzed the Breach of Contract Exclusion and focused on the fact that there was no separate contract for the later insulation work. It also noted that an email from the general contractor had been produced in discovery that essentially acknowledged that the insulation work was warranty work related to its original contract. Therefore, the Breach of Contract Exclusion applied, and no coverage was owed to the general contractor.

Greater N.Y. Mut. Ins. Co. v. Harleysville Worcester Ins. Co., No. 151179/2016, 2020 N.Y. Misc. LEXIS 799 (N.Y. Sup. Ct. Feb. 21, 2020).

Discovery Required for Determination Regarding Various Exclusions

In the underlying action, a condominium owner sued the condominium board alleging that his units were uninhabitable as a result of various construction defects. The owner also alleged bodily injuries and damages over many years.

GNY, one of the condominium board's insurers, agreed to defend the condominium board in the lawsuit. However, when other insurers disclaimed coverage to the board, GNY sued various insurers in this coverage dispute. This particular case determined GNY's motion for summary judgment against one of those insurers, Dongbu's, and whether it owed coverage to the board. Dongbu had disclaimed coverage based on lack of occurrence, the Owned Property Exclusion, Known Loss Exclusion, late notice, and various other provisions.

In opposition to GNY's motion, Dongbu asserted that the complaint against the board did not allege any occurrence during the Dongbu policy period, that the Known Loss Exclusion barred coverage, that the Cross Liability Exclusion applied, and because the motion was premature.

Examining the allegations against the board, the court acknowledged that the vast majority of the claims against the board were construction defect claims that appeared not to allege any occurrence. However, the court also noted that the owner was alleging damage to his property as a result of mold and leaks at the property.

With respect to the policy period issue, though, the court acknowledged that the Dongbu policy was effective between 2013 and 2014 and that GNY had not demonstrated that injuries took place during that time period.

Finally, with respect to the notice issue, Dongbu had raised an issue of fact regarding whether its insured had tendered copies of the owner's complaint. Ultimately, the court explained that the motion for summary judgment was premature.

ZDG, LLC v. PC Structures of NY, LLC, No. 654894/2018, 2020 N.Y. Misc. LEXIS 817 (N.Y. Sup. Ct. Feb. 14, 2020).

Damage To Property Exclusions

The insured was hired to perform concrete superstructure work for a large construction project, but subcontracted a portion of the work to a subcontractor. During the work, concrete invaded the property next door, and the project owner was required to remediate the work. The owner then filed this lawsuit against the insured's CGL insurer along with several other insurers.

The insured's insurer moved for dismissal because it claimed that it had no obligation under its policy to pay for the damages to the neighboring property. It argued that the damage was not the result of any occurrence and that even if it was, the coverage was excluded by the Damage To Property Exclusions under sections j(5) and j(6), which exclude coverage for damages to the insured's work.

The owner argued that because there was damage to property other than the project the insured was working on, there was coverage for all of the damages sought by the owner. The court disagreed and concluded that any damages to the insured's own work product were not covered under the property but that any damages to the neighboring property were covered.

DPC N.Y., Inc. v. Scottsdale Ins. Co., No. 19 Civ. 1743 (PGG), 2020 U.S. Dist. LEXIS 88651 (S.D.N.Y. May 19, 2020).

Continuing or Ongoing Damage Exclusion and the Residential Building Project Exclusion

The insured was a general contractor involved in a construction project. The owners of an adjacent building filed an underlying lawsuit against the general contractor and various other entities involved in the construction project. The underlying complaint alleged various damages that were suffered at the neighboring property, but the majority of the damages were alleged to have been caused by the project developer and the general contractor before the insured. However, the complaint did allege that the insured continued to work on the project, which sustained further damages and that the insured was negligent.

The insured's CGL insurer took the position that coverage was excluded under the Continuing or Ongoing Damage Exclusion and the Residential Building Project Exclusion and moved for dismissal pursuant to FRCP 12(b)(6). With respect to the Continuing or Ongoing Damage Exclusion, the court determined that the insurer had not demonstrated it applied. Although the underlying complaint alleged that there were damages sustained prior to when the insured began working on the project, it was impossible to determine the connection, if any, between those damages and those allegedly caused by the insured.

With respect to the Residential Building Project Exclusion, the court acknowledged that the underlying complaint alleged that the project was a residential project, but it further explained that there were questions regarding exceptions to the exclusion applied. The insurer asked the court to take judicial notice of documents it obtained online that purportedly demonstrated that no exceptions applied, but the court determined that it was inappropriate and that the issue could not be resolved pre-discovery. Thus, the insurer's motion was denied.

Practice Point: The fact that this decision was with respect to a motion pursuant to FRCP 12(b)(6) may have been dispositive in that this type of motion is pre-answer. Therefore, the court is not making any specific findings regarding whether there will or will not be coverage, but merely determining that discovery is necessary.

North Dakota

Selective Way Ins. Co. v. Glosson Group, No. 1:17-cv-230, 2020 U.S. Dist. LEXIS 115278 (D.N.D. Mar. 25, 2020).

Concrete Damage without Consequential Damages not an Occurrence

A property owner sued a concrete contractor and others for alleged faulty workmanship during the construction of a retail building and parking lot. Allegedly, the contractor improperly used concrete not suitable for the North Dakota climate, which caused the parking lot concrete at the building to scale, crack, and pop. A defendant general contractor sought coverage under the concrete contractor's commercial general liability policy as an additional insured pursuant to the terms of a blanket additional insured endorsement and requirements found in a subcontract with the concrete contractor.

Initially, the court found that the general contractor was an additional insured under the policy. The insurer, however, argued that the general contractor could not enjoy coverage under the policy due to faulty workmanship. The insurer argued that the general contractor knew that its purchase and use of the improper concrete was unsuitable for the project. The general contractor contended that the use of the concrete was based on the contractor's experience with other construction projects in the state.

The court noted that the parties' briefing focused on whether the general contractor's actions were intentional or expected for the purpose of determining if there was an accidental occurrence to trigger coverage. However, the court found that the general contractor's actions did not constitute an occurrence because the allegations in the underlying complaint alleged only defective workmanship. There were no allegations that the faulty workmanship by the general contractor or the concrete contractor caused any damages to any other person or any other property beyond the parking lot and, therefore the court found that there was no occurrence sufficient to trigger coverage.

The court also considered whether certain exclusions could apply to preclude coverage and held that the

Contractual Liability Exclusion's insured contract exception was inapplicable to cover a third-party pursuant to the terms of the contract because the contract's indemnification clause did not seek to compel the insured to assume the tort liability of another party. Rather, the general contract only applied to the insured concrete contractor's own liability. Therefore, the contract did not qualify as an "insured contract." Moreover, the court found that the "business risk" exclusions for damage to your product and damage to your work would operate to preclude coverage had an occurrence been present. The court rejected arguments of bad faith, wavier, estoppel, and breach of contract as well.

Oregon

Houston Specialty Ins. Co. v. Rodriguez Corp., No. 3:18-cv-1886-YY, 2020 U.S. Dist. LEXIS 10637 (D. Or. Jan. 22, 2020).

Alleged Damage Limited to Insured's Own Work

The primary issue in this decision was whether the federal district court was going to accept the report and recommendations made by the magistrate judge. The facts of the dispute, and the magistrate judge's recommendation are contained in *Houston Specialty Ins. Co. v Rodriguez Corp.*, 2019 U.S. Dist. LEXIS 225601 (D. Or. Oct. 25, 2019). The insurer filed this declaratory judgment action against its own insured and the owner-municipal corporation, and the insured filed motions for summary judgment. The district court judge agreed with the magistrate that the allegations in the underlying action's amended complaint could be interpreted as alleging harm to more than just the insured's work. The court also explained that the burden was on the insurer to prove lack of coverage and adopted the magistrate's recommendation that the insured's motion be granted.

Pennsylvania

Elite Restoration, Inc. v. First Mercury Ins. Co., No. 19-2215, 2020 U.S. Dist. LEXIS 31611 (E.D. Pa. Feb. 24, 2020).

Condominium Exclusion Precludes Coverage

A restoration company's project at a condominium property suffered damage when a hurricane struck the property. The restoration company sought coverage from its insurer for the damage to the property and for third-party litigation for the damage.

The policy in question included a Residential Property Exclusion that excluded property damage to "residential property," which the policy defined to include condominiums. An exception to the exclusion noted that it did not apply to "single-family dwellings that are not 'tract homes', condominiums (as defined by applicable controlling statute) or 'townhouse projects.'" The restoration company asserted that the exception creates three exceptions to the exclusion: condominiums, townhouse projects, and "single family dwellings that are not 'tract homes.'" The court disagreed, noting that the restoration company's interpretation would make the inclusion of condominiums in the exclusion clause meaningless. Thus, the court found that the Residential Property Exclusion operated to preclude coverage.

South Carolina

Bldrs. Mut. Ins. Co. v. Island Pointe, LLC, 2020 S.C. LEXIS 68, No. 27970 (S.C. 2020), *rehearing granted Ex parte Bldrs. Mut.*, 2020 S.C. LEXIS 120 (S.C. Aug. 12, 2020).

Intervention by Insurer in Underlying Action and Subsequent Declaratory Judgment Action

A condominium association filed suit against numerous contractors and subcontractors alleging they were responsible for numerous construction defects at the development. The association sought $17.5 million in damages due to the defendants' negligence. The contractor and subcontractor defendants' CGL insurers were not named in the suit. Three years later, near the close of discovery, several CGL insurers who were defending their respective insureds in the litigation moved to intervene for the sole purpose of participating in the preparation of a special jury verdict form and a general jury verdict form for trial. The insurers sought intervention in order to compel the jury to itemize and allocate damages to each defendant so the insurers could discern covered from uncovered damages and avoid a subsequent declaratory judgment action. The insurers sought to intervene as of right and under permissive intervention. The trial court denied their motions and the insurers appealed. The South Carolina Supreme Court transferred the appeal to itself.

The South Carolina Supreme Court reviewed the trial court's decision according to an abuse of discretion standard. The court affirmed the trial court's denial of the insurers' motion for intervention as of right on the grounds that South Carolina precedent makes clear that insurers of defendants in construction defect litigation are not "real parties in interest," as they do not have a direct interest in the litigation and therefore are unable to satisfy this element of intervention as a matter of right. The court also affirmed the trial court's denial of the insurers' motion for permissive intervention as their intervention would delay and prejudice the rights of the original parties to the action, the association, and the contractors. Specifically, the court found that the insurers' intervention would unnecessarily complicate the action, including altering the association's burden of proof, possibly delaying trial, and creating a conflict of interest for the insured's independent counsel supplied by its respective insurer. The court further modified a prior decision that reasonably implied that insurers could not subsequently file declaratory judgment actions seeking to delineate damages of an adverse underlying judgment between covered and non-covered damages. Ultimately, the court affirmed the trial court decision holding the trial court did not abuse its discretion. The insurers filed a motion for rehearing, which the court granted on August 12, 2020. Thus, this decision is not final.

Texas

Mt. Hawley Ins. Co. v. Huser Constr. Co., 797 Fed. Appx. 183 (5th Cir. 2020).

Breach of Contract and Damage to Your Work Exclusions Precluded Coverage

The insurer issued a CGL policy to an entity that worked as a general contractor to build an apartment complex. The general contractor, in turn, subcontracted the HVAC installation to another entity. The project owner filed a lawsuit again, *inter alia*, the general contractor after it discovered deficiencies with the HVAC work. The insurer denied coverage to the general contractor based on the policy's Breach of Contract exclusion and the exclusion applying to damages arising from the insured's work, sometimes referred to as the Damage To Your Work Exclusion. The lower court granted summary judgment to the insurer because it determined that the Breach of Contract Exclusion barred coverage for the claims against the insured. On appeal, the insured argued that the subcontractor exception to the Damage To Your Work Exclusion applied so there was coverage. In a succinct decision, the court disagreed and upheld the lower court's decision.

Mt. Hawley Ins. Co. v. Slay Engineering, No. 5-18-cv-00252-OLG, 2020 U.S. Dist. LEXIS 124660 (W.D. Tex. May 14, 2020).

Court Constrained to Follow Fifth Circuit

The coverage dispute arose from numerous alleged defects stemming from a municipal construction project. The insurer issued two CGL policies to the general contractor of the project. The underlying action against the insured alleged claims for breach of contract and negligence.

The court had previously granted the insurer's motion seeking a decision that there was no duty to defend as a result of the policy's Breach of Contract Exclusion. The court had also separately granted the insurer's motion for summary judgment and determined that the insurer had no obligation to indemnify its insured – again based on the Breach of Contract Exclusion. However, because the court was aware that a nearly identical case *Mt. Hawley Ins. Co. v. Huser Constr. Co.*, 797 Fed. Appx. 183 (5th Cir. 2020) (discussed above) was pending before the Fifth Circuit, the court granted the insured's motion for reconsideration.

In its motion for reconsideration, the insured argued that at least a portion of the alleged damages resulted from a subcontractor's work and not from any breach of contract. However, the court noted that the Fifth Circuit opinion made clear that the court had made the correct decision in granting the insurer's motion for summary judgment. Specifically, the court explained that even adopting a more narrow interpretation regarding the scope of the Breach of Contract Exclusion would still result in all of the damages being excluded.

Brit UW Ltd. v. FPC Masonry LP, No. 1:18-CV-876-RP, 2020 U.S. Dist. LEXIS 69241 (W.D. Tex. Feb. 13, 2020).

Multi-Unit Residential Work Exclusion

The coverage dispute arose from an underlying construction defect action filed by a group of homeowners

against the developer of a residential development. The developer had hired various subcontractors, including the insured.

The insurer had issued several potentially applicable policies to the insured, and the policies contained a Multi-Unit Residential Work Exclusion, which explained that coverage under the policies was excluded for the insured's work related to construction of a development exceeding ten dwellings. There was no dispute that the development consisted of 18 duplex buildings and 8 condominium buildings, so the insurer took the position that no coverage was owed to its insured.

In its motion for summary judgment, the insured argued that the insurer had an obligation to defend it because the complaint against it made no mention of the number of units at the complex, and the insurer was constrained to consult only the complaint and the policy in order to determine whether coverage was implicated. The insured alternatively argued that the term "master planned residential community" was ambiguous.

In determining the issue, the court explained that the complaint was silent regarding whether the exclusion was implicated, so the court was able to look at extrinsic facts because the extrinsic facts did not overlap with or contradict the allegations in the underlying action. Thus, the court considered an expert affidavit addressing the issue.

The court also rejected the insured's argument that the term "master planned residential community" was ambiguous and decided that the development at issue clearly fell within the term, so coverage was excluded.

Practice Point: Although Texas follows the eight corner rule in determining whether there is a duty to defend, i.e., it will generally only look at the complaint against the insured and the insurance policy, there are exceptions to the general rule, as exemplified here.

Mid-Continent Cas. Co. v. McCollum Custom Homes, No. 4:18-CV-4132, 2020 U.S. Dist. LEXIS 118505 (S.D. Tex. May 20, 2020).

Coverage Barred by Earth Movement Exclusion

This declaratory judgment action arose from an underlying lawsuit filed by a family against the insured, a custom home developer, alleging various damages to the family's home. The claims against the insured were for breach of contract, breach of express warranties, and deceptive trade practices. The insured's CGL insurer asserted that there was no coverage for the underlying lawsuit because coverage was barred by the Earth Movement Exclusion and Defective Work Exclusion.

The insurer moved for summary judgment based on these exclusions. To determine whether coverage was barred by the exclusions, the court examined each of the categories of damages alleged by the owners. With respect to the Defective Work Exclusion, the court determined that it applied to several, but not all, categories of damages. The Earth Movement Exclusion applied to damage "that is directly or indirectly caused by, involves, or is any way related to any movement of earth, whether naturally occurring or due to manmade or other artificial causes." The insured asserted that there were some damages that were not alleged to have been caused by the movement of earth. The court rejected the argument because it said that all of the allegations in the underlying complaint blamed the various categories of damages on the deficiency of the soil foundation. The court explained that the complaint did not suggest any alternative causes to the damages. Thus, the court granted the insurer's motion and determined that the insurer did not owe any duty to defend or indemnify.

Virginia

Builders Mut. Ins. Co. v. J.L. Albrittain, Inc., No. 1:19-cv-1315 (LMB/MSN), 2020 U.S. Dist. LEXIS 81211 (E.D. Va. May 7, 2020).

Alleged Concealment of Property Damage not an Occurrence

Business partners constructed and sold several townhouses to residents, who discovered that the townhouses had significant water leaks and water damage caused by design and construction defects. The residents filed suit, alleging that the business partners knew about the water leaks before selling the townhouses, and asserting claims for breach of the implied statutory warranty, fraud, fraud in the inducement, and violation of the Virginia Consumer Protection Act. The business partners' insurer sought judgment that the residents' complaint failed to state an occurrence or

was excluded pursuant to the terms of a commercial general liability policy.

The court agreed, noting that the residents' complaint was replete with allegations of intentional conduct that was neither an "occurrence nor an accident," and, therefore, failed to trigger the insurer's policy. Further, the court explained that three paragraphs alleging negligence not supported by facts failed to constitute an occurrence. The court also held that, even if the residents alleged an "occurrence," the policy's "business risk" exclusions would operate to preclude coverage for the claim.

Washington

Developers Sur. & Indem. Co. v. View Point Builders, Inc., No. C20-0221JLR, 2020 U.S. Dist. LEXIS 107201 (W.D. Wash. June 17, 2020).

Designated Work Exclusion, Non-Compliance with Building Codes, and Continuous or Progressive Injury and Damage Exclusions Apply

The insured was a general contractor hired by homeowners to remodel their residence, including "installing new roofing, windows, exterior stucco, and related weatherproofing." Five-to-six years after the insured ceased its work at the project, the homeowners sued the insured, alleging its work did not comply with the Washington Building Code and that improperly installed windows and exterior stucco caused water to leak into the residence. The homeowners asserted claims for breach of contract, fraudulent concealment, and violation of Washington's Consumer Protection Act.

After coverage was tendered to it, the insured's general liability insurer commenced a declaratory judgment action seeking a declaration that it did not owe the insured coverage in connection with the homeowners' suit. The insured defaulted in the declaratory judgment action, and the insurer proceeded with a motion for default judgment, arguing its suit was meritorious because coverage was precluded by various exclusions.

The first exclusion relied on by the insurer, the Designated Work Exclusion, barred coverage for property damage arising out of "all work completed or abandoned prior to the inception of the date of the policy." The court found that because the insured's work was completed in 2013, and the policy at issue did not incept until 2015, coverage was barred by this exclusion. The insurer also relied on a Non-Compliance with Building Codes Exclusion, which barred coverage for property damage arising out of "construction . . . of any structure in a manner not in compliance with the controlling building code." The court found that because the underlying pleadings asserted that much of the insured's work was non-compliant with the controlling building code, coverage was barred by this exclusion. Finally, the insurer relied on the Continuous or Progressive Injury and Damage Exclusion, which barred coverage for property damage that "first existed, or was alleged to have first existed, prior to the policy period" even if the damage "continued during the policy period." The court found that the exclusion applied because the homeowners' suit alleged that the relevant damages to the residence were caused by construction defects that existed years before the policy's inception date.

Wisconsin

Uneeda Rest, LLC v. Hexum, No. 2019AP1357, 2020 Wisc. App. LEXIS 344 (Wisc. App. July 28, 2020).

Definition of an "Occurrence"

In 2016, the insured began construction of a new house on Whitefish Lake in Wisconsin where a cottage had previously stood. The insured's property shared a driveway with a neighbor, and the driveway had a French drain the neighbor had built. Although the parties shared the driveway that was partially located on the insured's property and partially located on the neighbor's property, the insured had an easement to use that part of the driveway on the neighbor's property. During construction of the insured's home, the insured's contractors drove their heavy machinery over the shared driveway damaging it and destroying the French drain. The insured paid for repairs to the driveway but not to replace the French drain. In addition, with the neighbor's permission, but without the insured's knowledge, the insured's contractors were also permitted to drive over non-easement portions of the neighbor's property to access the insured's property to perform excavation work.

Once the new home was completed, which had a larger footprint than the cottage, there was less permeable soil and, notwithstanding the insured's gutter system, the neighbor claimed additional water runoff that damaged

the concrete slab under his garage. The neighbor constructed a drainage system that allegedly obstructed the insured's easement, which caused the insured to file the instant action. The neighbor filed several counterclaims alleging, in pertinent part, the insured's construction damaged his property. The insured tendered the suit to his homeowner's insurer who agreed to defend against the counterclaims under a reservation of rights. The insurer intervened in the underlying action and moved for summary judgment and a declaration of no coverage. The insured objected, but the trial court granted the insurer's motion. The insured appealed.

For purposes of appeal, the neighbor alleged damage to (1) the French drain under the shared driveway; (2) the concrete slab outside his garage; and (3) his non-easement property due to heavy machinery traveling over it. The court held that with respect to alleged damage to the French drain and the concrete slab, the neighbor did not allege "property damage" caused by an "occurrence" as required by the policy. The inquiry for determining whether an event qualifies as an "occurrence" under Wisconsin law is whether the "injury-causing event" was an accident-neither intended nor expected. The court explained that concerning damage to the French drain, the contractors intentionally drove on the driveway and the insured expected damage to the driveway as a result. Thus, even though the full extent of the damage was not intended or expected, the court concluded the "injury-causing event" was not accidental. With regard to damage to the concrete slab due to water runoff from the completed home, the court held this property damage was also not caused by an "occurrence" because the home was built as intended. Finally, the court determined that the alleged damage to the neighbor's non-easement property qualified as an "occurrence" because it was not expected or intended from the standpoint of the insured given he was not aware the contractor agreed with the neighbor to traverse the non-easement property.

Paustian Med. & Surgical Ctr. v. IMT Ins. Co., 391 Wis. 2d 495 (Wis. App. 2020).

Impaired Property Exclusion

A medical facility hired the insured to design, furnish, and install an HVAC system as part of a build out to its facility. After completing the project, the facility sued the insured and its CGL insurer for breach of contract and negligence alleging, in pertinent part, the insured's design of the HVAC system was inadequate, furnished defective services and materials, failed to provide services in a workmanlike manner, and failed to meet applicable HVAC codes. The facility claimed it was damaged because of the allegedly defective HVAC system in that it lost income because it was unable to use the built-out area for certain procedures and incurred costs to repair and replace the HVAC system. The insurer moved for summary judgment seeking a determination that it had no duty to defend or indemnify the insured in connection with the facility's lawsuit as the facility failed to allege "property damage" caused by an "occurrence" and because coverage was precluded by the Impaired Property Exclusion. The trial court granted the insurer's motion and the facility appealed.

As an initial matter, the intermediate level Wisconsin Court of Appeals assumed without deciding that the facility did allege "property damage" caused by an "occurrence." The court then analyzed the applicability of the Impaired Property Exclusion and identified two pertinent prongs. First, for the exclusion to apply, the property damage alleged must be property damage to property that has not been physically injured or destroyed. Second, the alleged loss of use must arise out of a breach of contract, or alleged defect or deficiency in the work. The court held the first prong met because the facility alleged it was unable to use the built-out area but did not allege any physical injury or destruction. The court held the second prong met because the facility alleged this loss of use resulted from the insured's breach of contract and a defect in the HVAC system. Accordingly, the court held the exclusion applied to preclude coverage and affirmed. ■

MEALEY'S LITIGATION REPORT: CONSTRUCTION DEFECTS INSURANCE
edited by Shawn Rice
The Report is produced monthly by

LexisNexis®

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Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1550-2910