MEALEY'S™ LITIGATION REPORT

Construction Defects Insurance

Construction Defect Claims: A 2021 Update Part II

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Commentary

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[Editor's Note: Thomas F. Segalla, Michael T. Glascott, Ashlyn M. Capote and Adam R. Durst are partners and Sean P. Hvisdas and Samantha M. McDermott are associates at Goldberg Segalla LLP. Any commentary or opinions do not reflect the opinions of Goldberg Segalla LLP or LexisNexis®, Mealey Publications™. Copyright © 2022 Thomas F. Segalla, Michael T. Glascott, Ashlyn M. Capote, Adam R. Durst and Samantha M. McDermott. Responses are welcome.]

Introduction

In Part I of this publication, the authors discussed insurance coverage construction defect cases from the first half of 2021. In many of those decisions, the courts analyzed the impact that the specific findings in the underlying construction defect action had on the insurer's obligation to provide coverage. Likewise, in *Cmb Developers v. Associated Indus. Ins. Co.*, No. 2:19-cv-09973-SVW-RAO, 2021 U.S. Dist. LEXIS 148897 (C.D. Cal. July 9, 2021), discussed below, the court explained why a particular classification limitation endorsement may have been deemed ambiguous for purposes of the duty to defend but why, following discovery in the underlying action, the endorsement was not ambiguous for purposes of the duty to indemnify.

As seen below, construction defect insurance coverage cases typically implicate a variety of insurance coverage issues, such as the scope of additional insured coverage and when property damage is deemed to have occurred. Additionally, one issue addressed in the cases below is whether a Contractual Liability Exclusion applies to claims for breach of contract or whether the exclusion is interpreted more narrowly. For example, in *Main St. Am. Assur. Co. v Jenkins*, No. 3:20-4172-MGL-PJG, 2021 U.S. Dist. LEXIS 229717 (D.S.C. July 14, 2021), the District of South Carolina determined that the Contractual Liability Exclusion barred coverage because the underlying lawsuit against the insured alleged that the insured had failed to abide by its contractual obligations. This issue overlaps with the issue of whether allegations of faulty work sound in contract and are therefore not an "occurrence" or accident, which is what numerous jurisdictions have determined.

In Part II of the publication, the authors discuss all of the insurance coverage construction defect cases decided nationwide in the second half of 2021.

California

Bestland, Inc. v. Colony Ins. Co., No. 2:21-cv-01750-SVW-JC, 2021 U.S. Dist. LEXIS 142048 (C.D. Cal. July 22, 2021).

No "Occurrence" for Mistaken Placement of Walls

The insured was retained for the demolition and rebuilding of a single-family residence. The insured was described in the agreement for the project as the gen-

eral contractor. The insured was sued by the owner of an adjoining property for destroying a wood fence on that property, building an unpermitted and unapproved cinderblock wall on its property, and building another unapproved and unpermitted wall on that property on top of an existing stucco wall. The insured tendered the suit to its liability insurer. The insurer denied coverage based on the policy's Classification Limitation Endorsement and the absence of an "occurrence." A coverage action followed the insurer's disclaimer.

The Classification Limitation Endorsement limited coverage under the policy to damages pertaining to the insured's operations listed in the policy, which were limited to "carpentry." The court found that the Classification Limitation Endorsement did not preclude the insurer's duty to defend because "there was some possibility of liability based on carpentry work." Notwithstanding, the court determined that the policy did not provide coverage for the lawsuit because it did not allege an "occurrence." The court held that the complaint only alleged that the insured committed intentional acts (i.e., trespassing and encroaching on the claimant's property) resulting in damage, which is not an "occurrence." The court specifically noted that, simply because the insured made a mistake in placing the relevant walls, does not make its conduct an "accident" or "occurrence," holding "negligence about an act's consequences does not turn an otherwise intentional act into an accident."

Tutor Perini Bldg. Corp. v. First Mercury Ins. Co., No. 2:20-cv-09329-CAS-GJSx, 2021 U.S. Dist. LEXIS 123605 (C.D. Cal. July 1, 2021).

Duty to Defend When Damage Exists Beyond Faulty Workmanship

A project owner entered into a contract with a general contractor to construct an underground garage and a tower of residential units. The owner procured an Owner Controlled Insurance Program (OCIP) in connection with the project, under which both it and the general contractor were insured. At some point during the project, the owner terminated its relationship with the general contractor. At the time of termination, the only work that had been completed was the underground garage. The general contractor sued the owner for money allegedly owed under the contract. The owner counterclaimed for fraud, conspiracy, unfair trade practices, fraudulent lien, breach of contract, and breach of the implied warranty of fitness. The general contractor tendered its defense in connection with the counterclaims to the OCIP insurer, who asserted no coverage was available for the claims, causing coverage litigation to ensue.

On summary judgment motions, the parties appeared to not dispute that the causes of action for fraud, conspiracy, unfair trade practices, and fraudulent lied were based on intentional torts and therefore not covered "occurrences" under the policy. However, as to the remaining causes of action, the court found there was a possibility of coverage because the owner alleged a series of claims regarding the general contractor's mismanagement of subcontractors resulting in defects and damages from subcontractors' work (which applied to all portions of the project), as well as the general contractor's failure to secure the project from Hurricane Irma, resulting in water damage at the project. Because there was allegedly damage at the project beyond the general contractor's faulty workmanship, the court found a duty to defend.

Cmb Developers v. Associated Indus. Ins. Co., No. 2:19-cv-09973-SVW-RAO, 2021 U.S. Dist. LEXIS 148897 (C.D. Cal. July 9, 2021).

Designated Operations Exclusion Unambiguous Based on Fully Developed Record

The insured was a contractor that remodeled and sold a home. As part of that project, it retained a contractor to fabricate and install a fire sprinkler system in the home. After the home's buyer moved in, the sprinkler system allegedly activated and caused damage to the home. The buyer sued the insured for damages, who thereafter tendered its defense and indemnification in connection with the suit to its liability insurer.

The insurer initially denied coverage based on the policy's Designated Construction or Operations Exclusion, which barred coverage for damages arising out of "Fire Suppression System – Installation." However, in a prior decision, the court had determined that there was a duty to defend because the term "installation" was ambiguous because it could be read to only apply to incidents caused by negligent installation of fire suppression systems and, here, there was a possibility the incident was caused by something other than the negligent installation of a fire suppression system.

At issue was whether the insurer had a duty to indemnify because the parties agreed that the contractor's failure to have installed a fire sprinkler that would only activate at higher temperatures caused the alleged damage. The court held that the exclusion did, in fact, apply to bar coverage. Notably, the court observed that its prior determination that the provision was ambiguous did not change this result because, on the record before the court, there was no reasonable interpretation of "installation" on which the exclusion would not be triggered.

Pulte Home Corp. v. Tig Ins. Co., No. 3:16-cv-02567-H-AGS, 2021 U.S. Dist. LEXIS 206388 (S.D. Cal. July 27, 2021).

Additional Insured Coverage in Construction Defect Litigation

A residential real estate developer who served as a general contractor for two development projects was seeking additional insured coverage under general liability policies issued to its subcontractors in connection with lawsuits filed by the homeowners of those two projects alleging construction defects. The insurer denied coverage to the developer for the suits.

As to the first suit, the insurer moved for summary judgment, asserting it did not owe a duty to defend since, according to certain discovery responses provided by the developer in coverage litigation, all expenses incurred by the developer were incurred by the developer in connection with pre-litigation proceedings required under California law, which were specifically precluded under the policies' definition of "suit." Applying Georgia law, the court disagreed, finding that the insurer could not retroactively obviate its duty to defend (which clearly existed) based on certain discovery responses that "may imply" the insured did not incur any expenses litigating the civil case. The court denied the insurer's motion for summary judgment on its defense obligation.

With respect to the second suit, the insurer asserted that it did not owe the developer additional insured coverage under the policies' blanket additional insured provisions because the relevant trade contracts in which the insurance procurement provisions were located did not reference the project at issue, and therefore did not satisfy the endorsements' written contract requirement. The court disagreed, noting that the endorsement did not contain a requirement that the written contract must specifically reference the policy at issue and the contract documents, when taken together, sufficiently satisfied the endorsements' requirements. The court denied the insurer's motion for summary judgment on this claim as well.

Pac. Bay Masonry, Inc. v. Navigators Specialty Ins. Co., No. C 20-07376 WHA, 2021 U.S. Dist. LEXIS 176712 (N.D. Cal. Sep. 16, 2021).

Duty to Defend Where Damage to Other Work is Possibility

The insured was hired to install concrete masonry units at a construction project. Following completion of the project, the successor to the owner of the project filed a lawsuit against, inter alia, the general contractor that had hired the insured, alleging various defects with the project. The underlying action commenced in earnest, and at some point the insured sought coverage from its insurer. The insurer reviewed the plaintiff's interrogatories, including the list of alleged damages, and the insurer denied coverage based on the policy's Damage To Your Work Exclusion and Damage To Your Product Exclusion. The insurer denied an obligation to provide the general contractor with coverage on the same basis.

In this coverage action, the court concluded that the insurer had an obligation to provide its insured with a defense and that the policy's insuring agreement was triggered in the first instance. With respect to the exclusions at issue, the court explained that the exclusions will apply when the defective work is the insured's own product but that if the "bare possibility" exists that another source is responsible for the damage, then the exclusions do not apply. The court recited verbatim a portion of the insurer's denial letter and concluded that the insurer had seemingly acknowledged that part of the problem with the work may have been caused by another contractor.

Colorado

Houston Cas. Co. v. Swinerton Builders, No. 20-cv-03558-NYW, 2021 U.S. Dist. LEXIS 23606 (D. Colo. Dec. 2, 2021).

Demand Letter Does Not Constitute a "Suit"

The insured was a general contractor that was hired by a property owner for the ground-up construction

of two 32-story high-rise apartment buildings. The insured provided notice to its liability insurer of a coverage claim related to "allegations of, among other things, trade damage to the [Project's] roof and related systems." The manufacturer opined that the roof needed to be removed and reinstalled as was originally specified. The owner demanded that the insured proceed immediately with full removal and replacement of the impacted roofs at the project, after which the insured agreed to replace and reinstall the roof at no cost to the owner. The insured sought coverage from its liability insurer for water damage to the project's roof system. Significantly, the owner never initiated a civil action or arbitration against the insured for the project's roof system.

After receiving notice of the insured's claim relating to water damage to the project's roof system, the liability insurer commenced suit against the insured seeking a declaratory judgment that it did not owe the insured a duty to defend or indemnify. In particular, the insurer argued no coverage was owed based on the absence of any covered "suit." The insured countered that the owner's demand letter constituted an "alternative dispute resolution proceeding" pursuant to the policy's definition of "suit," on the basis that the "notice of claim process" constitutes an "alternative dispute resolution proceeding" under the Colorado Defect Action Reform Act (CDARA). The court sided with the insurer, however, recognizing the demand letter did not seek to impose any legal obligations upon the insured, and thus failed to constitute a "suit." In addition, as to CDARA, the court found that the statute only applied to the "notice of claims process," and that a mere demand letter is insufficient to demonstrate the existence of a "proceeding."

Auto-Owners Ins. Co. v. Bolt Factory Lofts Owners Ass'n., No. 18-cv-01725-RBJ, 2021 U.S. Dist. LEXIS 178344 (D. Colo. Sept. 20, 2021).

Coverage for "Rip and Tear" Costs

This insurance coverage action concerned an underlying lawsuit in which an owners association sued contractors, including the general contractor, after encountering construction defects at its building. The general contractor commenced a third-party action against the insured alleging the insured defectively installed doors and windows at the project which caused water damage. The insured's liability insurer defended the insured in connection with the third-party action. The general contractor assigned its claims against the insured to the owners association.

At trial against the owners association, the insured was found liable for a total of $2,365,285.50 in damages for defective installation of windows and doors. The insurer commenced suit against the owners association to whom the insured assigned its rights under the policy, seeking a declaration that they are not liable for any portion of the judgment applicable to "rip and tear costs" to get to the insured's own defective work.

The court defined "rip and tear" costs to include "costs to tear out or damage previously undamaged work in order to repair or replace damaged or defective work." The court found that if particular rip and tear costs were necessary to access and repair damaged property other than the insured's own work, then those costs would be covered. However, the court found that, based on the record presented, there was an issue of fact as to whether the judgment included rip and tear costs solely to remove the insured's work, which is not covered, or was exclusively related to rip and tear costs that were necessary to repair or replace third-party property that was damaged by the water leaks at the property, which are covered. The court denied the insurer's motion for summary judgment on rip and tear damages.

Delaware

Pennsylvania Natl. Mut. Cas. Ins. Co. v. Zonko Bldrs., Inc., No. 21-437-MAK, 2021 U.S. Dist. LEXIS 168855 (D. Del. Sep. 7, 2021).

Defective Work Performed by a Subcontractor

The insured was a general contractor on a condominium project. Approximately nine years after the project was completed, the condominium association discovered various alleged damages and sued the insured and various subcontractors seeking damages related to water damage, foundation problems, and design defects. The insured's liability insurer agreed to defend the insured pursuant to a reservation of rights but filed this coverage lawsuit asserting that it did not owe coverage.

The insurer asserted (1) the insuring agreement in the policy was not triggered because no occurrence was alleged; (2) if an occurrence was alleged, it did

not occur during the policy period; and (3) various exclusions applied including the policy's Contractual Liability Exclusion, Damage To Your Product Exclusion, Impaired Property Exclusion, and Recall of Products Exclusion.

The court concluded that an occurrence was alleged because the complaint against the insured alleged, inter alia, that the damage was caused by subcontractors. Pointing to the subcontractor exception within one part of the Damage To Property Exclusion, and relying on extra-jurisdictional cases such as *Black & Veatch Corp. v. Aspen Ins. (UK) Ltd.*, 882 F.3d 952, 962 (10th Cir. 2018), the court concluded that "if the Policy does not cover subcontractors' faulty work, the Policy's Your Work Exclusion need not specifically except subcontractors' 'work.'"

With respect to the various exclusions, the court concluded that they either did not apply because the allegedly defective work was performed by subcontractors or that they were factually inapposite. For example, the court concluded that the Damage To Your Product Exclusion did not apply because the complaint alleged damage to real property and not to any of the insured's products.

Florida

Travelers Indem. Co. v. Richard McKenzie & Sons, Inc., 10 F.4th 1255 (11th Cir 2021).

Exclusions j(5) and j(6)

A citrus grove owner hired the insured to manage all aspects of the grove. The insured allegedly billed the owner for hundreds of thousands of dollars for trees that were not planted, fertilizer that was not applied, and fuel that was not delivered. The insured also damaged the grove by failing to properly plant and maintain the trees and the surrounding land, such as the drainage ditches. The owner filed a complaint against the insured, alleging false billing, theft, and claims for breach of contract, breach of fiduciary duty, and equitable accounting. A year later, the owner amended the complaint to include a count for negligence. The insured and owner settled the non-negligence claims for $200,000. With regard to the negligence claims, the insured and owner settled for approximately $2.9 million with the agreement that the owner could satisfy the judgment only through the insurer's liability policies.

The insurer sought a declaratory judgment that it owed no duty to defend or indemnify the insured for the two complaints. It also argued that it had no obligation to pay the state court judgment, which it alleged was the result of collusion. The owner counterclaimed for breach of contract and declaratory judgment that the negligence judgment was enforceable against the insured. The insured later joined in those counts.

With regard to the underlying negligence count, the insurer contended that exclusions for Damage To Property Exclusions under j(5) and j(6) barred coverage. Specifically, the policy excluded property damage to "that particular part of real property on which you or any contractors or subcontractors directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations." The insured argued that the coverage grant under the policy's Farm Care-Taker Liability Coverage Form was illusory because the Damage To Property Exclusions would eliminate that coverage under the endorsement.

The court ultimately concluded that coverage was barred by the exclusions. Specifically, the court found that the insured's operations were allegedly broad, encompassing the ground, trees, and caretaking, such as fertilizing, watering, and harvesting the trees. Further, the only land that was damaged, according to the complaint, was the grove on which the insured was working. The complaint did not allege any property damage that did not fall within the scope of that exclusion, and the Eleventh Circuit affirmed summary judgment for the insurer.

Cincinnati Specialty Underwriters Ins. Co. v. KNS Group, LLC, No. 20-61349-CIV-DIMITROULEAS, 2021 U.S. Dist. LEXIS 180116 (S.D. Fla. Sep. 20, 2021).

Questions Regarding Scope of Insured's Work

The underlying lawsuit was brought by a casino against, inter alia, a subcontractor that had been hired to furnish labor and material for exterior glazing in connection with the installation of a glass façade at the casino. The subcontractor had, in turn, hired the insured, a sub-subcontractor to glaze and install the window walls.

Both the subcontractor and the insured sought coverage under two CGL policies that the insurer had issued to the insured. In this coverage lawsuit, the insurer sought

a declaratory judgment that it owed no duty to defend or indemnify the insured or the subcontractor. The insurer asserted that coverage was barred by the policy's Damage To Property Exclusions under j(5) and j(6), the Impaired Property Exclusion, and the Breach of Contract Exclusion. The insurer also asserted that the subcontractor was not entitled to additional insured coverage because coverage under the endorsement was limited to the additional insured's vicarious liability.

Analyzing the duty to defend standard and specifically only the allegations that were made in the underlying complaint, the court explained that the complaint did not expressly allege what actions of the insured had caused the defects. The court determined, "The relevant inquiry here is not the scope of work the Sub-subcontract explicitly contemplates, but rather what operations [the insured] was performing at the moment the damages occurred." Thus, the court stated it could not determine that the Damage To Property Exclusions applied.

The court also concluded that it was unclear whether the Impaired Property Exclusion barred coverage. It noted that the exclusion only applies "if there is no injury to other property and there is 'merely ... economic loss resulting from injury to the product itself.'" The court determined that the general allegations in the complaint of "property damage" and "future property damage" meant that it was unclear whether the exclusion applied.

The court also concluded that the Breach of Contract Exclusion did not apply given that there were various claims against the insured and subcontractor besides just the breach of contract claim. The court noted that, if the insurer wanted the exclusion to apply whenever a contractual relationship was implicated, it would have to so specify in the language of the exclusion. Thus, the court ultimately concluded that the insurer had a duty to defend its insured.

The court did, however, agree with the insurer's position that the additional insured coverage was limited to claims for vicarious liability, and therefore there was no obligation to provide the subcontractor with additional insured coverage.

Illinois

Zurich Am. Ins. Co. v. Arch Ins. Co., No. 20-50966, 2021 U.S. App. LEXIS 36916 (5th Cir. Dec. 14, 2021).

Damage to Work Other Than the Insured's Work Product

The insured was hired to perform drainage work on a highway construction project. As part of the contract governing its work, the insured agreed to name the contractor as an additional insured. A developer sent an arbitration demand to the contractor because it claimed portions of the project began to crack and heave before the road even opened to the public. A notice of claim included various inspection reports that implicated damage caused by a drainage outlet pipe.

The contractor's insurer demanded that the insured's insurer defend and indemnify the contractor as an additional insured. The insurer refused, contending that the developer's arbitration demand implicated only the insured's own work, which the policy excluded. The district court agreed and entered summary judgment for the insured's insurer.

The Fifth Circuit reversed and found that the insured's insurer had an obligation to defend and indemnify the contractor as an additional insured. The court held that the allegations in the developer's claim satisfied the policy's requirements. With regard to property damage, the developer alleged that the soil erosion from the drainage system caused, among other things, abutment movements, sheared bearing pads, and cracked riprap, and that these things were not necessarily part of the insured's work.

Iowa

Henning Constr. Co. v. Phoenix Ins. Co., No. 4:21-cv-00051, 2021 U.S. Dist. LEXIS 248416 (S.D. Iowa Nov. 5, 2021).

EIFS Exclusion

The insured was hired to serve as general contractor to build a conference center. Approximately seven years after construction was complete, the owner complained to the insured that the building was suffering water intrusion issues. The insured hired an expert to evaluate the damage and then coordinated repairs that occurred over the course of several years. The insured then settled claims with various subcontractors and their liability insurers and sought its share of the repair costs from its own liability insurer.

The insurer denied coverage based on the Exterior Insulation and Finish System (EIFS) Exclusion because it asserted that the insured's own investigation into the damages had determined that the cause of the damage was the incorrectly installed EIFS. The exclusion applied, in relevant part, to a subcontractor's work "with respect to any exterior component, fixture or feature of any structure if an [EIFS], or any substantially similar system, is used on any part of that structure."

The court's analysis regarding how EIFS Exclusions are typically construed was extensive, and the court initially found that the exclusion was unambiguous. However, analyzing the language of the exclusion, the court found it important that the major issue that apparently caused the water infiltration was related to the weather-resistant barrier that was part of the stone cladding system on the building. Thus, the court concluded that, given the language of the exclusion, it was necessary to determine whether the weather-resistant barrier was part of the building's interior or exterior. Thus, the court determined there was an issue of fact precluding the grant of summary judgment.

Louisiana

Project Consulting Servs. v. Emplrs. Ins. Co., No. 20-1441, 2021 U.S. Dist. LEXIS 172942 (E.D. La. Aug. 13, 2021).

Professional Services Exclusion

The insured was hired to assist with a pipeline construction project, but at some point the pipeline was damaged during a storm. The pipeline owner's insurer paid for the repairs but then filed a subrogation lawsuit against the insured for negligence and breach of contract. Specifically, it was alleged that the insured had provided inadequate oversight of the pipeline construction and design. The insured's CGL insurer agreed to pay the insured's defense but advised that it would not pay indemnity because it did not think there was coverage.

The insurer asserted that three exclusions applied to bar coverage: (1) Professional Liability Exclusion; (2) Damage To Property Exclusion under j(5); and (3) Damage to Property Exclusion under j(6). Specifically, the insurer asserted that the action against the insured was for its faulty professional services and because the lawsuit sought compensation for damages to the insured's own work product—the pipeline itself.

The court ultimately concluded that the insurer had no obligation to defend or indemnify the insured because the Professional Liability Exclusion applied. The court explained that professional liability exclusions have been found to apply even where the insured provides both professional and non-professional services. However, the court found it significant that the action against the insured had asserted that, but for the insured's negligent review of the design of the pipeline, the damages would not have occurred. The court noted that it could not think of a scenario where the insured's non-professional services caused its negligent review of the pipeline design, and therefore the exclusion applied.

Nevada

Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co., 497 P.3d 625 (Nev. 2021).

Continuous or Progressive Injury or Damage Exclusion

This insurance coverage dispute arose out of construction defect claims related to numerous homes built by subcontractors at the direction of development companies. The insureds were issued a policy that contained a Continuous or Progressive Injury or Damage Exclusion, which the insurer asserted applied. The exclusion provided that there was no coverage for existing property damage unless the damage was sudden and accidental and took place within the policy period.

This particular case was heard by the Nevada Supreme Court after the lower court sought certification regarding the singular question of whether the insurer or insured had the burden of proof to demonstrate that the exclusion's exception applied. The court noted that the majority of states had adopted the rule that the insured has the burden to demonstrate that an exception to an exclusion applies and adopted that rule here.

New York

Wentworth Group v. Evanston Ins. Co., No. 20-CV-6711 (GBD)(JLC), 2021 U.S. Dist. LEXIS 126873 (S.D.N.Y July 8, 2021).

Exclusions for Intentional Conduct and Theft Do Not Bar a Duty to Defend

The insureds provided property management and project management services to the board of a condo-

minium in New York City. Suit was filed against the insureds by the board for persistent construction and design defects in the condominium building, which included causes of action for fraud, aiding and abetting, civil conspiracy, and breach of contract. The insureds tendered the suit to their liability insurer, which issued a Real Estate Services and Property Management Services Professional Liability Insurance policy that provided coverage for "[d]amages as a result of a claim first made against the insured ... by reason of ... a Wrongful Act ... in the performance of Real Estate Services or Property Management Services." "Wrongful Act" included a "negligent act, error or omission in Real Estate Services or Property Management Services."

The insurer acknowledged the claims in the suit alleged "Wrongful Acts" under the policy and agreed to provide coverage, including splitting the costs of the insured's selected counsel. After several years of litigation, including motions to dismiss, the only remaining claims were two breach of contract claims. Nearly five years after coverage was acknowledged, the insurer indicated it would no longer contribute to the insureds' defense on the basis that the remaining breach of contract claims allege intentional conduct, and therefore did not arise from a "Wrongful Act." This coverage litigation ensued.

During the coverage litigation, the insurer relied on two exclusions in an effort to abrogate its defense obligation. The first exclusion barred coverage for any claim that involved conduct of the insured that is intentional, which the insurer asserted barred coverage for the breach of contract claims. The court disagreed, noting that the allegation in the complaint did not foreclose a finding of negligence, notwithstanding the claims were based on breach of contract.

The second exclusion applied to claims arising out of conversion, misappropriation, and theft, which the insurer asserted applied to the allegations relative to the insureds' misuse of the condominium funds. While the court acknowledged some of the board's allegations arise from claims of conversion and/or misappropriation, the remaining causes of action were not solely based on those facts and, as such, the exclusion did not bar the insurer's duty to defend.

589 7th St LLC v. Certain Underwriters at Lloyd's, 2021 N.Y. Misc. LEXIS 6754, 2021 NY Slip Op 32792(U) (N.Y. Sup. Ct. Dec. 21, 2021).

Absence of an "Occurrence" and Application of Business Risk Exclusions Preclude Coverage

The insured was retained by a building owner to repair the façade of a building. In doing so, the insured improperly applied a coating to the façade in violation of its permit for work from the New York City Landmark Preservation Commission. Though the insured attempted to remove the coating, it was unable to remove it all, leaving an irregular, non-uniform façade, which is not "a Landmarks approved condition." The owner thereafter commenced suit against the insured for the defective work, for which the insured's general liability insurer denied coverage. The owner secured a default judgment against the insured. Prior to said judgment being entered, the owner commenced suit against the insured's liability insurer alleging "breach of contract and breach of insurance coverage." The liability insurer moved to dismiss based on the absence of any alleged "property damage" caused by an "occurrence."

The court sided with the insurer on its motion to dismiss, finding the owner's complaint against the insured arose exclusively out of a contract dispute between the owner and the insured for the insured's improperly performed work under the contract, and therefore did not allege an "occurrence" resulting in "property damage." In addition, the court found that the policy's Expected or Intended Exclusion, Contractual Liability Exclusion, and other business risk exclusions acted to bar coverage in its entirety. As a result, the court granted the insurer's motion to dismiss the owner's complaint.

Oregon

State Farm Fire & Cas. Co. v. Evans Constr. & Siding Corp., No. 3:19-cv-00972-BR, 2021 U.S. Dist. LEXIS 125266 (D. Or. July 6, 2021).

Confirmation of Lack of Property Damage Within Policy Period Does Not Permit Insurer to Pass Off Defense Costs

The insured was a subcontractor on a project to build an apartment complex. The general contractor was sued by the owner of the project for certain construction defects at the project. The general contractor commenced a third-party action against the subcontractor, alleging the subcontractor was, at least in part, responsible for the construction defects at the project.

The complaint did not allege with specificity when any alleged property damage resulting from the defective work occurred. The insured tendered its defense to various liability insurers, including its insurer that provided coverage for the period 2006-2008. It was subsequently discovered that there was not any damage caused by the insured's work at the project prior to the expiration of the 2006-2008 policy.

The insurer for the 2006-2008 policy period commenced a coverage action against its insured, seeking, among other things, a declaration that it did not owe its insured a duty to defend or indemnify in connection with the general contractor's third-party action. After commencement of that suit, the owner's claim and general contractor's third-party action were settled without contribution from the 2006-2008 insurer. The insured that withdrew its tender of a defense in its answer to the coverage action complaint thereafter sought to dismiss the insurer's claims for declaratory relief as moot since the underlying action had settled without the insurer's contribution and it no longer sought a defense from the insurer. The court agreed, dismissing the insurer's claims for declaratory relief.

The insurer separately asserted claims for equitable subrogation/unjust enrichment and common law indemnity against the insured's co-insurers in an effort to recoup its *pro rata* share of defense costs. As to the insurer's equitable subrogation claim, the court was not persuaded it had merit, concluding the insurer failed to establish it paid an obligation that should have been paid by the other insurers. The court was also not persuaded by the insurer's arguments under a theory of unjust enrichment because neither the insured nor the co-insurers made any misrepresentation that induced the 2006-2008 insurer to assume the defense. Finally, the court denied the 2006-2008 insurer's motion based on common-law indemnity because the 2006-2008 insurer accepted the insured's defense tender, even though it was aware that there may not be coverage. The court determined the insurer could not pass its perceived obligations under the policy to the co-insurers.

Pennsylvania

Atain Ins. Co. v. Basement Waterproofing Specialists, Inc., No. 20-5440-KSM, 2021 U.S. Dist. LEXIS 213240 (E.D. Pa. Nov. 3, 2021).

Water Intrusion Damages

An insured allegedly failed to properly perform its work installing a new French drain at a New Jersey residence. The insured had also been hired to repair a crack in and reinforce the front basement wall, but allegedly a rainstorm following the construction had caused flooding around the front wall and the other three walls. The homeowner asserted there was extensive fracturing and bowing on the front wall that the insured had allegedly reinforced and repaired.

An engineer sent by the insured to investigate allegedly told the homeowner that a French drain is insufficient and the waterproofing work should have been performed on the outside of the basement walls. The homeowner filed suit against the insured. In turn, the insurer sought a declaratory judgment that it owed no duty to defend or indemnify its insured for its faulty workmanship.

The insurer filed a motion for judgment on the pleadings, arguing that faulty workmanship is not an "occurrence." The insured contended that the homeowner's complaint against it alleged damage to property on which the insured did not work, including to all four basement walls, and that the consequential damages were sufficiently accidental to constitute an "occurrence." The court rejected that argument, relying on Third Circuit case law holding that there is no occurrence when the damages are not reasonably foreseeable. Because water intrusion is a reasonably foreseeable consequence of the improper installation of a French drain or waterproofing work, the court granted judgment on the pleadings in favor of the insurer.

South Carolina

Main St. Am. Assur. Co. v. Jenkins, No. 3:20-4172-MGL-PJG, 2021 U.S. Dist. LEXIS 229717 (D.S.C. July 14, 2021).

Contractual Liability Exclusion and Damage To Property Exclusion

Homeowners hired the insured to construct their home, but later filed suit alleging claims for, inter alia, breach of contract, breach of warranties, negligence, conspiracy, and fraud. The homeowners asserted that the insured had failed to properly clear the premises and failed to procure the appropriate licenses and

permits. The insured's liability insurer asserted that coverage was barred by the policy's Contractual Liability Exclusion and Damage To Property Exclusion under j(6).

The court agreed. The court determined that the Contractual Liability Exclusion barred coverage because the underlying lawsuit against the insured alleged that the insured had failed to abide by its contractual obligations. The court also concluded that the Damage To Property Exclusion applied because the lawsuit against the insured sought damages to remedy the insured's defective work rather than damages to other property outside of the insured's work. The homeowners, who were also parties to the coverage lawsuit, asserted that summary judgment was premature, but the court disagreed.

Wisconsin

5 Walworth, LLC v. Engerman Contr., Inc., 963 N.W.2d 779 (Wis. App. 2021).

Fact Issues Precluding Summary Judgment with Questions Regarding Damages

A residential property owner contracted to have a swimming pool constructed. Several years after construction, the owner learned that certain defects, including the improper installation of concrete, caused the pool to leak, which necessitated the repair and replacement of the entire pool complex. The owner filed suit against the general contractor, a subcontractor, and their insurance insurers. The subcontractor joined the concrete supplier and its insurer, alleging that the supplier provided inferior concrete to the subcontractor. The general contractor alleged similar claims against the supplier. The insurers for the general contractor and supplier filed motions for summary judgment, contending that faulty workmanship is not an "occurrence" and that the only damage was to the insured's work, which the policy excluded.

The Wisconsin Court of Appeals found that with regard to the general contractor, it was possible that the subcontractor's faulty workmanship was an accident from the general contractor's point of view. Specifically, the court determined that evidence of cracking, which stemmed from the faulty workmanship, was not intended and could be both an "occurrence" and "property damage" as defined by the general contractor's policy. The court noted that evidence of cracks in the concrete and soil saturation caused by leaking water meant that there was the possibility of an accident not within the scope of any business risk exclusions, including for Damage to Property, Damage to Your Product, and Damage to Your Work. With regard to the Damage To Your Work Exclusion, the court noted that an exception to that exclusion could plainly apply if the subcontractor's work caused the damages.

The supplier's insurer also argued that there was no occurrence because the owner sought damages for the supplier's faulty workmanship. The court rejected this argument noting that the supplier did not provide workmanship, it provided a product that was allegedly defective. Taking that allegation as true, the court explained that the property damage caused by an allegedly defective product could be considered an "occurrence," further noting that product manufacturers purchase CGL coverage to guard against this very risk. The court also rejected the insurer's argument that the cracked concrete did not damage third-party property because the pool deck area concrete was not part of an "integrated system." Therefore, summary judgment was premature because it was not clear that the Damage To Your Product Exclusion applied. ■

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