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Construction Defects Insurance

Construction Defect Claims: A 2019 Update Part II

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Commentary

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[Editor's Note: Thomas F. Segalla, Michael T. Glascott are partners and Ashlyn M. Capote, Adam R. Durst 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™.

Introduction

This article is the second of two parts highlighting the 2019 construction defect cases that were decided across the country. The cases discussed below touch on numerous issues that typically arise from construction defect litigation, including the broader coverage issues that usually impact coverage analyses, such as a particular jurisdiction's duty to defend standard. Of note are the several Connecticut cases that analyze what constitutes a "collapse" in the first-party context and an analysis of several cases from North and South Carolina involving the same insured, which involve other issues sometimes tangential to construction defect claims, such as the duty to cooperate.

The authors anticipate that there will be numerous additional cases to discuss in this publication next year. One case recently decided in 2020 in Texas, *Brit UW Limited v. FPC Masonry LP*, evaluated a coverage claim involving exclusions for multifamily homes. We also look forward to the Connecticut Supreme Court's decision in *Nash Street LLC v. Main Street America Assurance Co.*, where the court will decide the scope of various business risk exclusions, including what the language "that particular part" means in the context of "your work" exclusions. The authors look forward to closely watching the development of this body of case law throughout 2020.

California

Pulte Home Corp. v. TIG Ins. Co., No. 18-55792, 2019 U.S. App. LEXIS 35988, 2019 WL 6525203 (9th Cir. Dec. 4, 2019).

A general contractor was sued by multiple homeowners alleging construction defects at two separate homes, including leaks in different parts of their homes. The general contractor sought additional insured coverage under its subcontractor's liability policy in connection with the suit. The court found that the general contractor was entitled to a defense in connection with that suit because the allegations in the complaint were sufficiently vague so as to potentially include allegations of property damage that occurred during the subcontractor's ongoing operations. The court also found that the policy's business risk exclusions did not unambiguously apply to the general contractor's work because those exclusions only applied to "your work," with "your" being defined to only include the named insured (i.e., the subcontractor).

Graham Plumbing & Drain Cleaning, Inc. v. Colony Ins. Co., No. EDCV191130PASPX, 2019 U.S. Dist. LEXIS 180984, 2019 WL 6482920 (C.D. Cal. Oct. 17, 2019).

The insured was a plumbing contractor sued by a homeowner for water damage from leaky pipes at the homeowner's house as a result of the insured's defective plumbing work. The homeowner's property carrier commenced a subrogation action against the insured-contractor seeking reimbursement for amounts expended to remediate the homeowner's house as a result of the defective plumbing. The insured-contractor sought coverage from its liability carrier in connection with the subrogation action. The liability carrier disclaimed coverage on the basis that the alleged water leak occurred two years after its policy expired, placing the claim outside the scope of coverage. The insured-contractor commenced an action seeking a declaration that its carrier owed it both a duty to defend and indemnify in connection with the subrogation action.

The liability carrier filed a motion for judgment on the pleadings on the basis that the facts alleged establish that it did not owe coverage to its insured in connection with the subrogation action. In particular, the complaint in the coverage action alleged that the leak relevant to the underlying action occurred two years after the carrier's policy expired. The insured, however, argued that the property damage occurred when the insured-contractor first performed work at the homeowner's house, which was during the policy period. The court, however, sided with the carrier, finding that, under California law, the defective construction itself does not constitute property damage under a liability policy. The court, therefore, held that the carrier had no obligation to defend or indemnify its insured in connection with the underlying action.

Webcor Constr., LP v. Zurich Am. Ins. Co., 372 F. Supp. 3d 1061 (N.D. Cal. 2019).

A general contractor on a hotel construction project was sued by the project owner for damage to a curtain wall system resulting from defects in the system's installation during the course of the project. The general contractor and its curtain wall contractor were being defended by the same carrier in connection with that suit. Both tendered coverage to the sub-subcontractor at the project, which was retained by the curtain wall contractor to "furnish [a] complete factory[-]assembled and glazed curtain wall system . . . " The sub-subcontractor's carrier denied coverage for the claim.

The lawsuit by the project owner eventually settled, and during the course of related coverage litigation, the carrier defending the general contractor and curtain wall contractor asserted a claim for contribution against the sub-subcontractor's carrier for defense costs expended in connection with the underlying action. The sub-subcontractor's carrier first argued that coverage was not owed based on the lack of property damage because the damage alleged in the underlying action was limited to the curtain wall system itself. The carrier for the general contractor and curtain wall contractor disagreed, arguing the insulated glass units, which were manufactured by another contractor and later glued to the sub-subcontractor's curtain wall system, were damaged due to the sub-subcontractor's faulty workmanship, thus constituting "property damage" under California precedent.

The court sided with the sub-subcontractor's carrier, finding that damage to a component of an integrated final product did not constitute distinct "property damage" covered by a CGL policy. The court also concluded that the claim was otherwise excluded by the policy's business risk exclusions given the absence of any allegations concerning damage to anything other than the curtain wall itself. The court's holdings in this regard accounted for the conclusory allegation in the underlying complaint relating to the "costs to repair property damaged by deficient work . . . " The court found that this allegation, standing alone and in the absence of facts demonstrating damage to something other than the curtain wall system, was insufficient to trigger the carrier's defense obligation.

Conway v. Northfield Ins. Co., 399 F. Supp. 3d 950 (N.D. Cal. 2019).

A tenant commenced suit against the insured-landlord, asserting claims for wrongful entry and loss of use of the leased premises (out of which the tenant was operating a restaurant). The tenant alleged that the contractor the landlord had retained to repair certain defects at the property only worked during the restaurant's operating hours, thus preventing the tenant from using the premises and its contents (i.e., kitchen equipment). The landlord tendered coverage for the lawsuit to its general liability carrier. The carrier denied coverage based on, *inter alia*, the lack of "property damage" caused by an "occurrence." The landlord, thereafter, commenced a declaratory judgment action against its carrier, and the court found that the allegations from the underlying action raised a potential claim for "loss of use of tangible

property" caused by an "occurrence" that took place during the policy periods, thus triggering coverage.

Ins. Co. of State of Pennsylvania v. Am. Safety Indem. Co., 244 Cal. Rptr. 3d 310 (Ct. App. 2019), *reh'g denied* (Mar. 25, 2019), *review denied* (May 22, 2019).

A homeowner obtained a $1.1 million arbitration award against a general contractor for defective construction work at the homeowner's premises. The defective construction work related to improper grading done by the general contractor's grading subcontractor, which resulted in cracks in the walls of the premises. While the arbitration was pending, the general contractor commenced suit against the grading subcontractor seeking, among other things, contractual and equitable indemnity and contribution. The grading subcontractor failed to timely answer the complaint, and the general contractor obtained a final default judgment for an amount in excess of the aforementioned arbitration award, plus over $300,000 in attorneys' fees.

The general contractor's excess liability carrier, which indemnified the general contractor in connection with the arbitration award, commenced suit against the subcontractor's carrier seeking recovery of the judgment obtained by the general contractor against the subcontractor. The subcontractor's carrier argued that the default judgment against the subcontractor was not recoverable because the damages award was not for "property damage." The court disagreed, determining that the damage to the walls as a result of the subcontractor's improper grading clearly constituted property damage. The subcontractor's carrier thereafter argued that because the general contractor's carrier did not offer evidence to establish when the alleged damage first occurred, there was no coverage under any of the policies. The court disagreed with this argument as well, holding that coverage was triggered because the general contractor's carrier established that the alleged property damage first appeared during the subcontractor's carrier's policy period.

The court also emphasized that coverage was triggered in that instance, not by the conduct that caused the damage, but by when the property itself was damaged. Because the damaged property did not appear before the effective date of the policy, it was not deemed to have happened in its entirety before that date (per the policy's provision), thus placing it within the scope of coverage. In short, the court held that for the purpose of determining whether there was coverage within the policy period, the focus is on when the injured party was actually damaged (i.e., when there was physical injury to the home, as opposed to when the wrongful conduct occurred).

Great N. Ins. Co. v. Wausau Underwriters Ins. Co., No. 17CV2493-L-LL, 2019 U.S. Dist. LEXIS 54587, 2019 WL 1429579 (S.D. Cal. Mar. 29, 2019).

This was a declaratory judgment action that arose from an underlying construction defect claim in which a contractor was alleged to have been negligent for using defective products on a plumbing project at a condominium project. The contractor filed a cross claim in the underlying action against the insured, which manufactured the allegedly defective products. The insured tendered coverage to various liability carriers. One carrier agreed to fund the defense of the insured and contributed toward settlement of the claim on its behalf. The insured thereafter assigned its claims against the non-defending carriers. The defending carrier commenced suit against the non-defending carriers, seeking coverage under their policies on behalf of the insured.

The defending carrier argued in the declaratory judgment action that the non-defending carriers could not conclusively establish that all damages at issue in the construction defect lawsuit fell outside the scope of coverage or were otherwise excluded. The non-defending carriers, however, argued that the insured was on notice of the alleged property damage one year prior to the inception of their first policy. They asserted that this conclusively established that the property damage was deemed to have occurred prior to the commencement of their policy periods, and therefore outside the scope of coverage. In doing so, the non-defending carriers relied on a report issued prior to the inception of their policies. The court, however, found that because the report relied on by the non-defending carriers did not mention any actual damage, but instead only the potential for damage, they failed to establish conclusively that the alleged damage was outside the scope of coverage or otherwise excluded.

Mesa Underwriters Specialty Ins. Co. v. First Mercury Ins. Co., 411 F. Supp. 3d 607 (N.D. Cal. 2019).

The insured was hired to help construct seven solar carports that were completed in 2012. The insured was

later sued by the entity that retained it when, during certain "wind events," the carports did not perform as expected and were deemed deficiently designed and constructed. The insured tendered its defense and indemnification to two separate carriers. The first liability carrier provided coverage from November 2010 to November 2012, and the second from November 2012 to March 2015. The first carrier defended the insured in the underlying action, and funded a settlement in connection with that action. The second carrier, however, disclaimed coverage based on a continuous or progressive injury and damage exclusion, which barred coverage for damages for property damage "which were caused, or are alleged to have been caused, by the same condition(s) or defective construction which first existed prior to the inception date of this policy."

The first carrier sued the second carrier seeking contribution from the second carrier based on its coverage obligations to the insured. In particular, the first carrier argued that at least some of the damages alleged in the underlying action were traceable to "wind events" that took place in 2014, during the second carrier's policy period, rendering the aforementioned exclusion in applicable. The court disagreed, finding that although the complaint included allegations of damages arising from wind events, those damages were unambiguously alleged to have been caused by the pre-policy defective construction, placing it squarely within the scope of the exclusion. The court also rejected the first carrier's attempts to create an ambiguity in the exclusion where none otherwise existed, and found the second carrier had no duty to defend the insured in connection with the underlying action.

Atl. Cas. Ins. Co. v. Crum, 364 F. Supp. 3d 1123 (E.D. Cal. 2019).

The insured entered into a contract to drill, case, and preliminarily develop two water wells on county property. The insured allegedly breached that contract by failing to deliver working wells as agreed upon and by failing to report the accurate location of at least one of the wells. The insured was thereafter sued by the entity that retained it to perform the work. In the complaint, that entity was seeking damages for breach of contract and remediation costs. The complaint also included allegations that the insured negligently performed its work. The insured tendered that suit to its liability carrier, which agreed to defend the insured under a reservation of rights.

The liability carrier thereafter commenced suit against its insured, seeking a declaration that it did not owe coverage in connection with the underlying action because (1) the damages claimed in that action were not caused by an occurrence, and (2) the damages claimed do not constitute property damage. With regard to the first issue, the insured argued that the allegations relating to its drilling one of the wells in an incorrect location constituted an "occurrence" because the markers for that well were moved without the insured's knowledge. The court, however, found this was insufficient to allege an "occurrence" because the insured intended to, and did in fact, drill the well, albeit in the wrong location. Because the "volitional act that gave rise to the claim for damages" was intended by the insured, the court found there was no evidence of an "occurrence" in connection with that claim.

With regard to the second issue, the insured argued that the underlying action sought damages because of property damage such that coverage was triggered. However, the policy amended the definition of "property damage" to exclude damages from breach of contract. The court found that the damages relating to the claim for breach of contract and remediation costs, therefore, did not constitute property damage as defined by the policy. It further opined that, even in the absence of the exclusion, the damages constituted economic losses that the carrier's policy does not cover. The insured, however, went on to assert that the damages associated with the demolition of the misplaced well did constitute property damage, but the court disagreed, explaining that the damages were "remediation damages," which it opined did not constitute property damage under the policy.

Castellet, Inc. v. Golden Eagle Ins. Co., No. 8:18-CV-00582-DOC-KES, 2019 U.S. Dist. LEXIS 40900, 2019 WL 650423 (C.D. Cal. Jan. 8, 2019).

The insured sold stone to a masonry contractor for installation of a stone patio. Shortly after the stone paving material was installed, it allegedly began to decompose, crack, and deteriorate due to latent defects. The insured was sued by the owners of the project for negligence and breach of implied warranties of merchantability and fitness for a particular purpose. The insured tendered its defense in that action to its liability carrier, which denied coverage based on a products-completed operations exclusion (PCOH Exclusion), which barred

coverage for "property damage" occurring "away from premises [the insured] own[s] or rent[s] and arising out of 'your product.'"

The insured was eventually victorious in connection with the underlying action. However, it commenced suit against its liability carrier seeking, *inter alia*, reimbursement for defense costs incurred in the underlying action based on the carrier's wrongful denial. The issue in this case was whether the alleged property damage arose out of the insured's product, such that the PCOH Exclusion applied. The court found that the allegations in the complaint that: (1) the insured's stone decomposed, cracked, and deteriorated due to latent defects; and (2) the defects and deficiencies in the project were caused by the latent defects, placed the matter squarely within the scope of the PCOH Exclusion, thus nullifying the carrier's defense obligation. The court went on to state that "[t]he fact that the stone supplied was allegedly not defective and that damages were actually caused by defective installation or failure to warn does not remove" the underlying action from the PCOH Exclusion.

Connecticut

Washburn v. Nationwide Mut. Ins. Co., No. LLICV186018618S, 2019 Conn. Super. LEXIS 2532, 2019 WL 5172318 (Conn. Super. Ct. Sept. 13, 2019).

In this case, the owner and operator of a marina hired the insured to install bulkheads, but following the bulkheads' failure to perform, the owner sued the insured for negligent performance of contract. The case was referred to arbitration, and the insured eventually made a claim under his CGL insurance policy shortly before the arbitration hearing. The arbitrator rendered an award for the owner and operator of the marina and against the insured. The arbitrator issued an opinion in which she concluded that the insured's negligence was the proximate cause of the bulkheads' failure. The carrier denied coverage for the award, and this coverage action ensued. Although the insured commenced the coverage action, the owner and operator of the marine intervened as judgment creditors pursuant to Connecticut's direct action statute.

The carrier moved for summary judgment contending that the damages the insured was liable for were not "property damage" as defined by the policy and the arbitrator's award of attorneys' fees was not covered by the policy's supplemental payments coverage as "costs taxed against the insured." The court's reasoning and decision rely on controlling precedent and the unambiguous language of the policy.

First, relying on the Connecticut Supreme Court's decision in *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 67 A.3d 961 (Conn. 2013), the court concluded that property damage does not cover damages that result solely from and to faulty or defective workmanship. Accordingly, the policy did not cover the cost to replace the failed bulkheads because of the insured's defective work. Second, the court held that the portion of the arbitrator's award for attorneys' fees was not covered by the policy's supplemental payments coverage because the provision granting coverage for "[a]ll court costs taxed against the insured in a suit" expressly and unambiguously excluded "attorneys' fees or attorneys' expenses." Therefore, the court granted summary judgment to the carrier on this point as well.

Dinardo v. Pac. Indem. Co., No. CV-16-6010979-S, 2019 Conn. Super. LEXIS 1206, 2019 WL 2487851 (Conn. Super. Ct. May 30, 2019).

This case concerns a substantial and widespread problem for homeowners in Northeastern Connecticut whose homes were built more than 20 years ago. The insured owned and occupied his home beginning in 1984 and shortly after moving in, noticed small cracks in his concrete basement walls. The insured had consulted a contractor, who advised the cracks were nothing to be concerned about and applied sealant. In the 1990s, the insured completely finished his basement, covering the vast majority of the concrete walls with internal walls. In 2015, a contractor making unrelated repairs advised the insured of significant cracking in his basement walls and ultimately discovered the concrete walls' cracking and crumbling was caused by defective concrete materials used in his home's original construction. The homeowner also learned that eventually the walls would fail, but such failure and resulting collapse was not imminent. The insured commenced this coverage action against four carriers that issued homeowners policies to him between 1996 and 2019 seeking coverage for the replacement of the foundational walls. The parties filed cross-motions for summary judgment.

Although the court addressed numerous issues in its opinion, we discuss its conclusions regarding additional collapse coverage and the applicability of a structural

movement exclusion. First, Carrier A's coverage for "collapse" did not define the term and although a Connecticut Supreme Court case had interpreted the undefined term as meaning "any substantial impairment of the structural integrity of a building" the Connecticut Supreme Court accepted certification of whether this definition also applies to the policy language here and how it is to be applied to numerous cases of crumbling concrete foundations. Because a controlling decision would be forthcoming, the court denied Carrier A's motion for summary judgment without prejudice. Note that the Connecticut Supreme Court's decision in *Karas v. Liberty Ins. Corp.*, No. 20149, 2019 Conn. LEXIS 341, 2019 WL 5955947 (Conn. Nov. 12, 2019) is discussed below.

Second, Carrier B's additional collapse coverage defined "collapse" to mean, in pertinent part, that there is only coverage for "abrupt collapse." Thus, a home that is still standing "is not considered to be in a state of collapse," but must have fallen down or caved in "with the result that the building or part of it cannot be occupied for its current intended purpose." The court concluded the insured's loss did not satisfy the standard of "abrupt collapse" as defined in Carrier B's policy.

Third, Carriers C and D issued policies that contained a "structural movement" exclusion precluding coverage for "loss caused by . . . settling, cracking, shrinking, bulging or expansion" and an exclusion precluding coverage for "defective . . . construction," which included use of defective "materials." Despite the insured's efforts to distinguish the numerous cases holding that these exclusions bar coverage for the cost to replace deteriorating concrete basement walls and argue such damage falls within the "ensuing loss" exception, the court ultimately held that whatever peril might be identified as the cause of the loss, it was directly related to excluded cracking, expanding, and/or defective construction materials and there was no ensuing loss.

Huschle v. Allstate Ins. Co., No. 3:18-CV-00248 (JAM), 2019 U.S. Dist. LEXIS 53978, 2019 WL 1427143 (D. Conn. Mar. 29, 2019).

This case concerns another homeowner insured in Connecticut who had a deteriorating concrete foundation due to a chemical compound used in the concrete mixture that rendered it defective and resulted in cracking and expansion of the basement walls. The insured asserted that eventually, the concrete walls will become so weak that they will no longer be able to bear the weight of the exterior soil or the home and they will fail. Carrier A issued multiple homeowners policies affording coverage for collapse, which is undefined. Carrier B also issued multiple homeowners policies to the insured that do not expressly provide coverage for collapse and therefore, damage resulting from collapse may be covered unless barred by exclusion. The insured submitted a claim seeking first-party coverage for the deteriorating foundations to Carrier A and Carrier B, but both denied coverage. This coverage action ensued.

Carrier A's homeowners policy covered collapse so long as it was "sudden and accidental." It also covered collapse due to defective construction materials, though it provided collapse "does not include settling, cracking . . . or expansion." Although the court followed Connecticut law holding that "collapse," when undefined, means "any substantial impairment of the structural integrity of a building," the court noted a key distinction in Carrier A's policy—it required the collapse be "sudden and accidental." The court explained that in the insurance context, a "sudden and accidental" event is a temporally abrupt one and because the insured alleged the loss constituted damaged and deteriorating concrete walls that occurred over the course of years, the loss was not a temporally abrupt one. Of note, the court stated that it was the loss that must be sudden and accidental, not the cause of the loss. Carrier B's policy contained a "structural movement" exclusion that precluded coverage for losses caused by cracking caused by defective construction materials. Despite the insured's attempts to parse and distinguish cases holding the same or substantially similar language barred coverage for closely comparable crumbling concrete foundation cases where courts held coverage was precluded, the court concluded the exclusion unambiguously barred coverage for the loss.

Gilmore v. Teachers Ins. Co., No. 3:18CV1856 (JBA), 2019 U.S. Dist. LEXIS 151006, 2019 WL 4192287 (D. Conn. Sept. 4, 2019).

This is yet another crumbling concrete foundation case and the material underlying facts of this coverage action are substantially similar to those set forth by the homeowner insureds above in *Dinardo* and *Huschle.* Accordingly, we refer the reader to the factual sections of those cases and will refrain from reciting the facts of *Gilmore*

here. The court in this case acknowledged this district's analysis of the very same issues in prior decisions within the district and found the courts' reasoning persuasive. Therefore, the court decided the issues of policy interpretation—namely the requirement of an "abrupt" collapse and the preclusion of coverage by the "structural movement" exclusion—for the carrier and against the insured.

However, in this case, the insured made one additional argument: The policies' coverage was illusory and such an issue is an issue of fact not properly resolved on a motion to dismiss. As an initial matter, the court noted that whether a policy's coverage is illusory is a question of law as it is a question of contract interpretation. The court explained that a policy's coverage is illusory if any actual coverage that exists is minimal and affords no meaningful protection, but coverage is not illusory if a policy exclusion is narrower than the general grant of coverage. Because the "structural movement" exclusion was narrower than the coverage grant, coverage was not illusory.

Karas v. Liberty Ins. Corp., No. 20149, 2019 Conn. LEXIS 341, 2019 WL 5955947 (Conn. Nov. 12, 2019).

This is the Connecticut Supreme Court case referenced in *Dinardo* (discussed above) in which the U.S. District Court for the District of Connecticut certified several questions including whether the undefined term "collapse" in a homeowners insurance policy means "any substantial impairment of the structural integrity of a building," as previously announced by the court in *Beach v. Middlesex Mutual Assurance Co.*, 532 A.2d 1297 (Conn. 1987). Again, the facts of this case are the same or substantially similar to the other crumbling foundation cases referenced above. Accordingly, we refrain from reciting the facts and refer the reader to the above cases.

In this case, the court concluded that the undefined term "collapse," which also did not include qualifying terms requiring the collapse to be sudden, abrupt or accidental, was fairly susceptible to an interpretation that "settling and cracking . . . causing substantial impairment to the structural integrity of the home" and did not require the home be reduced to flattened form or rubble. The court determined that if an insured can show the foundation's settling and cracking caused substantial impairment to the structural integrity of the home such that it is in imminent danger of falling down or caving in, evidence that the home will eventually fall down even if it can still be occupied and is in no present danger of doing so.

Massachusetts

Styller v. Nat'l Fire & Marine Ins. Co., 95 Mass. App. Ct. 538, 128 N.E.3d 612, *review denied*, 483 Mass. 1102, 132 N.E.3d 949 (2019).

The underlying dispute in this case stemmed from the demolition and construction work the insured performed at a customer's home. The underlying parties litigated the action and the jury returned a verdict in favor of the customer, but found damages were limited to the insured's work. On the customer's claim that the insured violated Mass. G.L. c. 93A prohibiting deceptive trade practices, the court ruled in favor of the customer and awarded attorneys' fees. Although the insured's CGL carrier agreed to defend the insured in the underlying action, the carrier refused to indemnify the insured for certain damages because it relied on the jury's finding that damages were limited to the insured's work. The insured assigned its right to its coverage claim to the customer who brought this action.

The real dispute was regarding whether the carrier had a duty to indemnify the insured for the award of attorneys' and experts' fees under the policy's "supplemental payments" provision, which provided, in pertinent part, the carrier would indemnify the insured in a suit it defends for "all costs taxed against the insured in the suit." The trial court determined that it did, but on appeal, the Massachusetts Appellate Court held the policy does not use the term "costs taxed" in an ordinary sense but in a technical sense by reference to the term "suit," which in turn means a "civil proceeding." Accordingly, because Massachusetts follows the "American Rule" for litigation and relying on authority that referred to "costs" as not inclusive of attorneys' and experts' fees, the court held costs taxed in a "suit" or civil proceeding mean costs, but not fees, incurred in the litigation.

All Am. Ins. Co. v. Lampasona Concrete Corp., 120 N.E.3d 1258 (Mass. 2019).

This case arises out of the construction of a hospital. After completion of the construction, the hospital filed suit against the general contractor alleging construction defects and property damage to the first floor. The general contractor filed third-party complaints against

subcontractors whose work had been implicated by the hospital's lawsuit, including against the insured, a subcontractor who furnished and installed the concrete slab underneath the first floor. The general contractor claimed the insured improperly mixed concrete for the slab and improperly installed the slab such that it caused damage to the underlying vapor barrier and buckling of flooring atop the slab. To repair the damage caused by the insured's allegedly defective work, the hospital removed the existing tile and carpet, burned off fiber from the top of the concrete, and rolled a moisture mitigation system onto the slab. The insured tendered the lawsuit to its CGL carrier seeking a defense.

The CGL carrier filed this declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the insured in the lawsuit. The trial court granted the carrier's motion for summary judgment holding the policy's "your work" exclusion under section j(6) of the policy exclusions barred coverage as the concrete slab was integral and inseparable from the work other subcontractors performed on the flooring system. In so ruling, the trial court relied on *Bond Bros., Inc. v. Robinson*, 471 N.E.2d 1332 (Mass. 1984) wherein the Massachusetts Supreme Court held the Your Work Exclusion barred coverage for necessary remediation replacing a concrete wall because of an insured's failure to install the requisite rebar in the wall rendering it structurally unstable.

The Massachusetts Appellate Court distinguished *Bond Bros., Inc.* because the faulty workmanship at issue, the missing rebar, did not cause damage to other work or property, but was itself the damage. Here, the court held, the insured's concrete slab work was discrete and its allegedly faulty work caused damage to other subcontractor's distinct work that was not its own and thus the "your work" exclusion did not apply. Additionally, the "your work" exclusion does not apply to alleged damages that fall within the "products-completed operations hazard" and because the hospital alleged the damages occurred, at least in part, after the construction was completed, the exclusion, by its terms, would not apply to those damages. Therefore, the "your work" exclusion did not preclude coverage and the court vacated and remanded the trial court's decision.

Phoenix Ins. Co. v. Ragnar Benson Constr. LLC, 404 F. Supp. 3d 427 (D. Mass. 2019).

In this case, the owner, a transportation company, undertook reconstruction and expansion of its rail and trucking intermodal in Massachusetts. It entered into a prime contract with a general contractor that subcontracted roller compacted concrete (RCC) paving work to the insured. After the project was completed, the owner made an arbitration demand due to alleged construction defects at the project including deficiencies in the RCC. The allegations were limited to substandard RCC workmanship except in that the owner claimed the defective work caused water intrusion that in turn caused damage to the property's subgrade and that the operation of cranes over defective RCC could potentially damage them. Though not included in the owner's statement of claim, it alleged that its cranes had already been damaged by the defective RCC work. The general contractor then made an arbitration demand against the insured alleging it was ultimately responsible for damage alleged by the owner arising from defective RCC work. The insured tendered the arbitration demand to its CGL carrier, which denied coverage. The general contractor tendered its defense to the insured's CGL carrier as a purported additional insured, but the CGL carrier denied coverage to the general contractor as well. This coverage action ensued.

The parties filed cross motions for summary judgment and partial summary judgment regarding the carrier's duty to defend the insured and the general contractor in their respective arbitration proceedings. The carrier argued the allegations contained in the owner's statement of claim did not allege "property damage" caused by an "occurrence" as those terms are defined by the policy. It further claimed that coverage was precluded by the policy's "business risk" exclusions, which preclude coverage for damage from the insured's work to any part of the insured's work on the project. The court disagreed. It held that although the owner's statement of claim alleged the defective RCC work caused consequential damage to the property's subgrade and although its statement of claim did not include allegations of actual damage to its cranes, only the potentiality of damage, it notified the general contractor that its claim included damage to its cranes and the carrier was aware of this allegation as well. Moreover, the exclusions did not operate as a complete bar to coverage because the alleged damage to the subgrade and to the owner's cranes were not part of the insured's or the general contractor's work on the project. Therefore, the carrier owed a duty to defend to both its named insured and the general contractor.

Mills Constr. Corp., Inc. v. Nautilus Ins. Co., No. 1:18-CV-10549-IT, 2019 U.S. Dist. LEXIS 55256, 2019 WL 1440404 (D. Mass. Mar. 31, 2019).

In the above case, a customer hired the insured as general contractor for "reconstruction of a single family home." The insured insisted its scope of work did not include any work or alteration of the existing foundation. During demolition of the customer's fire-damaged home, the insured allegedly damaged the foundation. This caused problems for the remainder of the project and at some point, the customer commenced the underlying lawsuit against the insured. In her complaint, the customer alleged the insured damaged the foundation during demolition, the foundation lacked rebar reinforcement, and asserted various other construction defects unrelated to the foundation.

The insured tendered the lawsuit to its CGL carrier, which denied coverage based on lack of "property damage" caused by an "occurrence" and the real property exclusion, among others. The insured retendered to the carrier claiming it had a duty to defend as the customer alleged its damage to the foundation was accidental because it was not alleged to be intentional or purposeful. The carrier maintained its denial. The insured then submitted the customer's answers to requests for admissions in which she admitted the insured performed no work on the foundation prior to the accidental damage and an affidavit from the principal of the insured advising that its subcontractors, not the insured itself, caused the damage to the foundation. The carrier maintained its denial, and the insured commenced this coverage action.

First, the court focused on the carrier's duty to defend, which it noted arises from the allegations contained in the underlying complaint and that although facts extrinsic to the complaint may aid in establishing coverage, such facts cannot independently trigger a duty to defend. After reviewing the customer's allegations, the court concluded that the customer hired the contractor to complete the entire project of reconstructing the home, and that did not include an alleged accident resulting in damage to the foundation. Therefore, the court held that even if the complaint could be construed as causing property damage resulting from an occurrence, coverage would be precluded by the real property exclusion under (j)(5). The court further held that the insured's provision of additional extrinsic evidence did not mandate a different result because the contract between the customer and the insured was for "reconstruction of a single family home" and according to the customer's written discovery responses, the insured did contract to perform work bracing and securing the foundation. Accordingly, the court held the insured's scope of work included the foundation and consequently the carrier's duty to defend had not been triggered by the underlying complaint even after consideration of the insured's extrinsic evidence.

Fontaine Bros. v. Acadia Ins. Co., No. 3:18-CV-11636-KAR, 2019 U.S. Dist. LEXIS 148056, 2019 WL 4120285 (D. Mass. Aug. 29, 2019).

A city contracted with the insured to install a replacement refrigeration system, partly composed of two reciprocating brine chiller packages, in its hockey arena. These chillers were to contain stainless steel tubes and tube sheets with the remaining parts consisting of carbon steel. The insured furnished the materials and installed the refrigeration system, including the chillers, but the insured installed all carbon steel parts. Within four years of installation, the chillers failed, and the refrigeration system was rendered inoperable. As a result, the city filed suit against the insured claiming its use of carbon steel tubing instead of stainless steel tubing constituted faulty workmanship resulting in corrosion of the tubing and that the insured's improper maintenance of the condensers also caused the corrosion. The city sought recovery of its cost to replace the chillers, temporary chiller units, and additional administrative costs. The insured tendered the suit to its CGL carrier, which denied coverage asserting faulty workmanship did not constitute "property damage" caused by an "occurrence" under the policy and even if the coverage grant was satisfied, the policy's impaired property exclusion barred coverage. The insured settled the underlying case and initiated this coverage action.

First, the court addressed whether the city alleged "property damage" caused by an "occurrence." Applying Massachusetts law, the court held the city's allegations were reasonably susceptible to an interpretation the complaint alleged an "occurrence," meaning accident, because it failed to allege any intentional authorization to use the nonconforming tubing. Thus, the city alleged an occurrence. The court noted that an accident, or "occurrence," does not turn on whether the damage resulting from the occurrence is limited to the product,

property, or defective work itself. Next, the court analyzed the carrier's argument that the policy's impaired property exclusion barred coverage. The court held that the exclusion's intent is to preclude coverage for claims of damage that directly relate to the insured's faulty workmanship rather than damage to separate property, which is considered a business risk of the insured and not guaranteed by the carrier. The court explained that the allegations of the complaint left no question that the impaired property exclusion applied because the hockey arena was (1) "impaired property," or property that was less useful because it incorporated the insured's defective product or work (the chiller and refrigerator systems here); and (2) the arena could be restored to use by replacement of the insured's non-conforming tubing, chillers and ultimately refrigeration system. Accordingly, the impaired property exclusion barred coverage for the city's lawsuit.

Montana

Atl. Cas. Ins. Co. v. Quinn, No. CV 18-76-M-DWM, 2019 U.S. Dist. LEXIS 103566, 2019 WL 2550978 (D. Mont. June 20, 2019).

Homeowners hired the insured to construct a custom home. The construction was supposed to be completed in early 2017, but the homeowners sued the insured in 2017 for, *inter alia*, negligence, breach of contract, and construction default. The homeowners sought more than $2.6 million for construction delays. The insured's carrier agreed to defend the insured under a reservation of rights and then filed this action seeking a determination that no coverage was owed. Both parties moved for summary judgment.

Initially, the court determined that the construction defect claims against the insured alleged an occurrence based on the standard articulated in *Employers Mut. Cas. Co. v. Fisher Builders, Inc.*, 371 P.3d 375 (Mont. 2016), which determined that faulty workmanship can constitute an occurrence if the consequences were not expected or intended by the insured. The carrier had also argued that there was no coverage for the breach of contract claims because they did not constitute an occurrence, but the court explained that the proper inquiry was whether the conduct underlying the breach was an accident. The court concluded that based on the record, it could not determine whether the breach of contract was an occurrence. The court also concluded that it could not determine whether the misrepresentation and fraud-based claims constituted an occurrence based on the record.

The carrier asserted that Exclusion 2(j)(6), which bars coverage for "property damage" to property "that must be restored, repaired or replaced because 'your work' was incorrectly performed on it" also applied to bar coverage. The court determined that the exclusion barred coverage for the property damage that occurred during the insured's work on the home during its ongoing operations but because the record was unclear as to when the property damage occurred, the carrier had a duty to defend.

However, the court also concluded that there was no coverage for the breach of express warranty claim or the claim for violation of the Consumer Protection Act because the policy specifically excluded breach of warranty and consumer protection claims. The court also decided that there was no duty to indemnify the insured for the emotional distress damages and the unjust enrichment claim. The court further explained that there was no coverage for the liquidated damages claims against the insured which was a $3,728.45 per day penalty and there was no obligation to indemnify the insured for those damages.

Northland Cas. Co. v. Mulroy, 357 F. Supp. 3d 1045 (D. Mont.), *aff'd*, 789 F. App'x 60 (9th Cir. 2019).

A homeowner hired the insured to build a log home and guest house. The insured purchased logs from a log broker, but failed to treat the logs for insects. Several years after the home was completed, the homeowner discovered an infestation in both structures and filed a lawsuit against the insured. The insured's CGL carrier told the insured that there was no coverage for the damages, but agreed to defend the insured subject to a reservation of rights. Despite this, the insured settled the claim against it without consent from its carrier and then assigned its rights under the policy to the homeowner. The homeowner then attended a damages hearing, which the insured failed to attend, and $328,824.58 in damages was awarded.

This decision was on the carrier's motion for summary judgment, which focused on whether the carrier had an obligation to indemnify the insured for the damages award. The carrier asserted that Exclusion j(6), Exclusion k, and Exclusion l all barred coverage. The carrier

had previously argued that there was no occurrence, and the court had agreed, but the Ninth Circuit had reversed that decision based on *Employers Mut. Cas. Co. v. Fisher Builders, Inc.*, 371 P.3d 375 (Mont. 2016). Thus, this decision was limited to the policy exclusions.

Exclusion j(6), which applied to the insured's work that must be replaced because the insured's work was incorrectly performed on it, did not apply because the exclusion applied to ongoing operations and the damage occurred following completion of the work. Exclusion k applied to property damage to the insured's product, which was defined as goods other than real property, and the court concluded that it did not apply because the damage was to real property (i.e., the custom log home).

Exclusion l applied to property damage to the insured's work arising out of its completed operations, and the court ultimately determined that the exclusion applied to bar coverage. The homeowner had tried to argue that the damage was not to the insured's work, but the court noted that if the homeowner was not seeking damage for the insured's work then there would have been no claim against the insured. Similarly, the homeowner had argued that the deficient work was performed by a subcontractor, the log broker that the insured had purchased the logs from, but the court again noted that the basis for the claim against the insured was that it was the insured who was responsible for treating the logs.

New Hampshire

Wallace v. Nautilus Ins. Co., No. 18-CV-747-LM, 2019 U.S. Dist. LEXIS 122219, 2019 WL 3302172 (D.N.H. July 23, 2019), *reconsideration denied*, No. 18-CV-747-LM, 2019 U.S. Dist. LEXIS 202607, 2019 WL 6255234 (D.N.H. Nov. 22, 2019).

The insured contracted with two customers to replace the roofs of both their houses. Shortly after construction, the customers noticed the roofs were leaking and eventually had them replaced in their entirety. The customers demanded arbitration in which they sought damages for the cost to replace the roofs, the costs to repair or replace property damaged as a result of the leaky roofs, and attorneys' fees and costs. The insured's CGL carrier defended the insured in the arbitration. The arbitrator found the insured failed to properly install the roofs and awarded damages to the customers for the costs of roof replacement, cleaning, attic re-insulation, and re-painting, among others. Moreover, pursuant to the parties' stipulation, the arbitrator awarded attorneys' fees to the customers as the prevailing parties.

The insured's CGL carrier indemnified it for damage that resulted from the defective roof installation, but refused to indemnify it for the cost of the roof replacement or the attorneys' fees award. The insured declared bankruptcy and assigned its rights to the customers. With respect to the roof costs, the carrier argued the defective construction did not constitute an "occurrence" resulting in "property damage." The court agreed that the roofs were not "property damage" because they were the insured's own work. The court rejected the customers' "rip-and tear" contention, that replacement of the roofs constitute "property damage" because in order to repair certain resulting damage the roofs needed to be removed and therefore replaced because based on the court's review of the record, the arbitrator never made such a finding and there was no support for such a proposition. Similarly, the court also rejected the customers' "causal link" argument that the arbitrator determined the roofs required replacement because the roofs were leaking causing damage to the roofs themselves because the arbitrator at no point considered this as a basis or a factor in his decision.

The court agreed with the customers' arguments that the phrase "costs taxed" with the Supplementary Payments coverage is ambiguous and should be construed in favor of the customers standing in the shoes of the insured. The court noted that the carrier had failed to directly address this argument but principally relied on several cases from other jurisdictions holding the phrase as including attorneys' fees and the Insurance Services Office subsequent revision of its standard CGL policy to expressly state attorneys' fees were not covered under the provision.

New Jersey

Schnabel Found. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 780 F. App'x 5 (4th Cir. 2019).

The insured, a general contractor, was hired to build a mixed-use building in Maryland. The insured subcontracted construction of the support of excavation (SOE) system to an SOE subcontractor. An SOE system restrains earth immediately surrounding a building construction site so excavation and foundation work can occur and provides lateral support for neighboring

properties during construction. The SOE subcontractor contracted to complete the SOE work by March 2012. The SOE subcontractor improperly installed the SOE system causing soil to shift, which in turn caused damage to the floors in surrounding structures and resulted in the county issuing a stop work order until the SOE subcontractor could remediate the SOE system, which did not occur until October 2012.

The SOE subcontractor's defective SOE system caused the project's completion to be delayed by one year and resulted in litigation between neighboring property owners, neighboring tenants, the developer, the insured, and SOE subcontractor as well as among the developer, insured, and SOE subcontractor. The insured tendered the litigation to its umbrella CGL carrier, which denied coverage. After various settlements of the various actions, the SOE subcontractor received an assignment and commenced this suit against the insured's umbrella CGL carrier. The parties filed cross motions for summary judgment, and the district court granted the carrier's motion. The SOE subcontractor appealed.

The court affirmed the district court's decision and held the "impaired property" exclusion in the umbrella CGL policy barred coverage. For the "impaired property" exclusion to apply, the property must (1) be "impaired property" or property that has not been physically injured; and (2) "property damage" must arise out of a defect or deficiency in "your work," or a delay or failure by the insured or anyone acting on the insured's behalf to perform a contract. Under the first prong, the court held the project site constituted "impaired property" because it had become less useful through the incorporation of the defective SOE system necessitating the county's stop work order. Additionally, the site was not physically injured despite damage to third-party property. Finally, the damage arose from the insured's work because "your work" includes work performed on the insured's behalf (e.g., the SOE subcontractor's work). Thus, the "impaired property" exclusion precluded coverage.

North Carolina and South Carolina

City of Fayetteville v. Sec. Nat'l Ins. Co., No. 5:18-CV-331-D, 2019 U.S. Dist. LEXIS 122358, 2019 WL 3315201 (E.D.N.C. July 23, 2019).

The city hired the insured for a construction project that required removal of sediment along a creek. During the project, an employee of the insured got a track hoe stuck in the creek bed, which caused various issues including endangering a buried sewer line. The city then issued a stop work order and attempted to fix the problem and protect the sewer line. The city demanded that the insured repay it, but the insured's carrier denied coverage. Eventually the city obtained a default judgment against the insured, and the city sought to compel the insured's carrier to satisfy the judgment.

The carrier moved for summary judgment seeking a determination that no coverage was owed to the insured under the policy. Although one basis for the motion was that the city's lawsuit against the insured did not allege "property damage," the court explained that it need not decide the issue because Exclusions j(5) and j(6) applied to bar coverage. The court explained that j(5) applied because the insured was hired to work on both the creek bank and the creek bed and any property damage occurred to the real property on which the insured was working. The court also concluded that j(6) applied because the city sought costs arising from the insured's operations. The court also noted that the insured had failed to provide notice of the lawsuit (even though it had originally provided notice of the claim) to its carrier in breach of the policy's notice provision. Thus, the court granted the carrier's motion for summary judgment.

Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Castillo, No. 3:18CV271-GCM, 2019 U.S. Dist. LEXIS 37289, 2019 WL 1099795 (W.D.N.C. Mar. 8, 2019).

This is the first of several cases arising out of a coverage dispute involving the same insured and insurance carrier. This particular dispute arose over two underlying construction defect cases in South Carolina involving alleged defects prompting a homeowners association to sue its developer/general contractor and a subcontractor. The subcontractor was insured under several CGL policies, but its carrier denied coverage due to lack of cooperation. The carrier also denied additional insured coverage to the developer.

The carrier then filed this lawsuit against its insured. The homeowners association, the developer, and another party from the underlying action moved to intervene in this lawsuit. They asserted that intervention was proper because the policies at issue in this action against the insured were the same policies at

issue in the action involving the developer. The court determined that intervention of right was improper because the owner and developer had not obtained any judgment against the insured and therefore did not have a "significantly protectable" interest such that intervention was not necessary. The court also determined that permissible intervention was improper because the carrier had already obtained a default against the insured nearly a year before and allowing intervention would prejudice the carrier.

Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Castillo, No. 3:18-CV-00271-GCM, 2019 U.S. Dist. LEXIS 49319, 2019 WL 1332380 (W.D.N.C. Mar. 25, 2019).

This case also arose from the underlying construction defect cases in South Carolina involving alleged defects impacting a homeowners association, but this case was a decision granting the carrier's default judgment against its insured. The underlying litigation alleged that that the insured's work on a townhome project was defective, but a default was taken against the insured when it failed to appear. The court explained that the insured had failed to comply with the conditions of the CGL policies because it had never provided any notice to its carriers in connection with the litigation. There was also evidence that the insured had purposefully and knowingly failed to put its carrier on notice. Furthermore, the carrier was not put on notice until after a default was entered against the insured, so the carrier was prejudiced by the late notice, and the court entered a judgment in this action that no coverage was owed.

Fenwick Commons Homeowners Ass'n, Inc. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., No. 2:19-CV-00057-DCN, 2019 U.S. Dist. LEXIS 67580, 2019 WL 1760150 (D.S.C. Apr. 22, 2019).

This coverage dispute involved the same insured as the *Castillo* matters discussed above, but arose out of a separate construction project resulting in a construction defect lawsuit filed by a homeowners association. The homeowners association brought this lawsuit against the subcontractor's CGL carrier alleging that the policies covered the damage alleged in the underlying construction defect litigation and that the carrier was obligated to provide coverage to its insured and to the developer as an additional insured. The homeowners association sought reformation of the policies in the alternative.

This particular decision was regarding the carrier's motion to realign the parties and the homeowners association's motion to remand the action to state court. The carrier argued that the various entities that the homeowners association had made defendants in the action alongside the carrier, such as the developer and the subcontractor, were not true defendants because the homeowners association had not asserted any claims against them in this coverage action. Therefore, the court determined that those entities should be aligned with the plaintiff for diversity purposes.

The court also determined that removal was proper and that the homeowners association's motion seeking remand should be denied. The homeowners association asserted that that the court should remand the action based on abstention grounds, but the court explained that the coverage issues in this action would not be determined in the underlying action.

Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Portrait Homes-S.C., LLC, No. 318CV00561KDBDCK, 2019 U.S. Dist. LEXIS 160414, 2019 WL 4491535 (W.D.N.C. Sept. 18, 2019).

This coverage dispute is also related to the *Fenwick Commons* matter discussed above, but in this lawsuit, the subcontractor's carrier sought a determination that it did not owe coverage to the project developer. Through a settlement in the underlying construction defect litigation, the developer had assigned its rights to additional insured coverage under the policy issued to the subcontractor to the homeowners association. Thus, although this lawsuit was brought against the developer, the homeowners association was the real party in interest. This decision determined both the carrier's and the developer's motions for summary judgment.

During the pendency of the underlying construction defect litigation, the developer sought additional insured coverage from the carrier, and although the carrier never responded, it asserted that no coverage was owed.

The court declined to determine whether the developer was, in fact, entitled to additional insured coverage because it determined that the homeowners association had already been paid the full amount of the underlying settlement. Because the developer's primary carrier had paid its defense and the costs of the settlement,

the developer suffered no loss. However, because the homeowners association was the real party in interest, it argued that the settlement would have been higher if the carrier had not wrongfully denied coverage and participated in the negotiations. The court rejected that position because the homeowners association had been assigned the rights of the developer and was therefore limited to the developer's arguments.

Oklahoma

Country Mut. Ins. Co. v. AAA Constr. LLC, No. CIV-17-486-SLP, 2019 U.S. Dist. LEXIS 115935, 2019 WL 3069415 (W.D. Okla. July 12, 2019).

The insured was hired to construct a garage and barn. The owners later sued the insured asserting, *inter alia*, that they had been informed that the garage had been improperly constructed over two gas pipelines and their easements. Sometime thereafter, the insured's carrier informed it that it was denying coverage because the lawsuit against the insured did not allege any "occurrence" and because various policy exclusions applied. After the insured pushed back on the carrier's denial, the carrier filed this declaratory judgment action and eventually moved for summary judgment.

Initially, the court explained that a jury in the underlying action against the insured could conclude that the insured never intended to build the garage over the pipeline, so it was possible that the insured's conduct constituted an occurrence pursuant to the Oklahoma Supreme Court's decision in *Penley v. Gulf Ins. Co.*, 414 P.2d 305 (Okla. 1966). The court next concluded that the carrier had not demonstrated that the contractual liability exclusion applied because the agreement between the owners and the insured contained language in which the insured was not assuming any liability for property damage.

The court determined that the carrier's explanation with respect to the professional services exclusion was speculative and that the carrier had not demonstrated that it was performing professional services. The court also concluded that the damage to property exclusion, the your product exclusion, the your work exclusion, and the damage to impaired property exclusion may apply but that the carrier had not demonstrated that any of the exclusions conclusively barred coverage for the owners' claims. Therefore, the court denied the carrier's motion for summary judgment. The court also denied that portion of the carrier's motion seeking dismissal of the bad faith claim because, although the facts were scant, it was possible that the insured could demonstrate a valid bad faith claim.

MTI, Inc. v. Employers Ins. Co. of Wausau, 913 F.3d 1245 (10th Cir. 2019), *reh'g denied* (Feb. 12, 2019) (Oklahoma law).

An owner of cooling towers hired the insured to repair anchor bolts that had corroded in one of its cooling towers. The insured removed the corroded anchor bolts, but was unable to immediately install the new ones because the adhesive applicator had not yet arrived. Before it was able to install the new ones, there were high winds on site and several structural components in the tower broke. Because of the extent of the structural damage, the decision was made to remove and replace the tower, and it was determined that it would be too dangerous to try and salvage internal operational equipment.

The owner demanded that the insured pay the cost of removing and replacing the tower, which the insured sought from its CGL carrier. After the carrier denied coverage, the insured negotiated a settlement, but filed this declaratory judgment action seeking repayment. The carrier moved for summary judgment, and the federal district court granted the motion determining that Exclusions j(5) and j(6) barred coverage. J(5) barred coverage for "that particular part of real property" on which the insured was working and j(6) applied to "that particular part of any property" that had to be restored, repaired, or replaced.

The Tenth Circuit initially concluded that the language "that particular part" was ambiguous because it could be construed as referring to the distinct component on which the insured was working or to all the parts impacted by the faulty work. Because the language was ambiguous, the court explained that it must construe the language in the narrowest sense, which meant "that particular part" that the insured was working on was limited to the anchor bolts, and the insured was entitled to coverage for the cost of replacing the tower.

Evanston Ins. Co. v. A&S Roofing, LLC, No. CIV-17-870-SLP, 2019 U.S. Dist. LEXIS 142828, 2019 WL 3976852 (W.D. Okla. Aug. 22, 2019).

The insured was hired to replace roofs on three buildings, and approximately seven years later, the owner sued the insured for breach of warranty resulting from the insured's poor work.

The insured's CGL carrier filed this declaratory judgment action and eventually moved for summary judgment. The carrier asserted that coverage was not triggered by the owner's lawsuit because it did not allege any occurrence and did not allege "property damage" that the insured was "legally obligated to pay." The carrier also relied on (1) Exclusion 2.j(6) – the Faulty Workmanship Exclusion; (2) Exclusion 2.k – the Your Product Exclusion; (3) Exclusion 2.l – the Your Work Exclusion; (4) Exclusion 2.m – the Impaired Property Exclusion; (5) a Combination General Endorsement Exclusion for claims arising out of breach of contract; and (6) the exclusions for operations involving heat applications and membrane roofing.

The carrier asserted that under Oklahoma law, breach of warranty claims are not tort claims and therefore coverage is not triggered under a CGL policy. The insured countered that it was "the underlying nature of the suit" that governed whether coverage was triggered rather than the specific causes of action. Ultimately the court concluded that the lawsuit against the insured alleged claims sounding in both tort and contract and that even though the lawsuit did not allege negligence, the claims could be construed as seeking damages to property outside of the insured's work product. The court similarly determined that because there was no evidence that the insured had intentionally performed faulty work, the allegations against it could be construed as alleging an occurrence.

The court declined to analyze the various business risk exclusions because it determined that the breach of contract Exclusion and exclusions for roofing work both applied to bar coverage.

Texas

Bitco General Ins. Corp. v. Monroe Guaranty Ins. Co., No. SA-18-CV-00325-FB-ESC, 2019 U.S. Dist. LEXIS 127477, 2019 WL 3459248 (W.D. Tex. July 31, 2019).

Owners of a farm hired a contractor to drill a commercial irrigation well and later sued the contractor for faulty workmanship after the contractor allegedly damaged the owners' property. The complaint included causes of action sounding in breach of contract and negligence. The contractor tendered coverage to two of its liability carriers that insured it for separate policy periods. Only one of the carriers agreed to defend. The other carrier denied coverage on the basis that the alleged property damage fell outside the scope of its policy period and because two business risk exclusions otherwise barred coverage for the claim. The defending carrier commenced a declaratory judgment against the other carrier seeking contribution in connection with the contractor's defense.

First, the court in the coverage action found that the underlying complaint, which was largely devoid of allegations regarding when the actual property damage occurred, found that there was "potentially a claim" in the underlying complaint for property damage that occurred during the other carrier's policy period. The court's decision was based on the fact that a portion of the time between the execution of the initial contract and the commencement of the underlying lawsuit fell within the scope of the other carrier's policy period, indicating there could have potentially been property damage during that time period. The court did not permit the other carrier to rely on extrinsic evidence to avoid this conclusion.

The disclaiming carrier also sought to rely on business risk exclusions j.(5) and j.(6) to avoid its coverage obligations. However, the court found that those exclusions only apply to "[t]hat particular part" of the property that was subject to the defective work. Because not all of the claimed damage was the subject of the incorrectly performed work, the underlying action complaint did not fall squarely within the relevant exclusions. As a result, the court found that the disclaiming carrier had a duty to defend and was obligated to reimburse the defending carrier for its share of the contractor's defense.

Mt. Hawley Ins. Co. v. Huser Constr. Co., Inc., No. CV H-18-0787, 2019 U.S. Dist. LEXIS 44611, 2019 WL 1255756 (S.D. Tex. Mar. 19, 2019).

The insured was a general contractor seeking coverage in connection with a lawsuit commenced against it by the owner of a project. The owner alleged that after the insured completed its work, the owner discovered numerous deficiencies in the project, including certain issues relating to the HVAC system at the project, which was designed and installed by one of the insured's

subcontractors. The insured sought a defense from its liability carrier in connection with the lawsuit. Its carrier, however, disclaimed any obligation to defend or indemnify the insured based on the policy's "breach of contract" exclusion, which barred coverage for property damage "arising directly or indirectly out of . . . [b]reach of express or implied contract[.]" The insured disputed the carrier's disclaimer, arguing that the exclusion did not include, for example, the owner's allegations of negligence because to do so would render the coverage illusory. The insured also argued that the subcontractor exception to the "your work" exclusion preserves coverage because the HVAC work at the project was performed by one of the insured's contractors.

The carrier commenced a declaratory judgment action against its insured seeking a declaration that it did not owe coverage in connection with the owner's lawsuit based on the "breach of contract" exclusion. Taking into account the arguments raised by the insured, the court found in favor of the carrier, noting that the allegations of "property damage" "arose directly or indirectly" from the insured's breach of contract. The court disagreed with the insured's arguments to the contrary. In particular, the court found that the exclusion did not render coverage illusory because it does not reach every claim against an insured whose contract is contractual in nature—noting the exclusion requires a breach of contract, not the mere existence of a contract. Finally, the court held that just because the "your work" exclusion preserves coverage for damage caused by subcontractors does not mean that other policy exclusions must do the same.

Mt. Hawley Ins. Co. v. Slay Eng'g, 390 F. Supp. 3d 794 (W.D. Tex. 2019), *reconsideration denied*, No. 5-18-CV-00252-OLG, 2019 U.S. Dist. LEXIS 125295, 2019 WL 3315440 (W.D. Tex. June 27, 2019).

This matter involved a coverage dispute between the same carrier and insured as in *Mt. Hawley Ins. Co. v. Huser Const. Co., Inc.*, No. H-18-0787, 2019 U.S. Dist. LEXIS 44611, 2019 WL 1255756 (S.D. Tex. Mar. 19, 2019), and involved nearly identical coverage issues as that action, though in connection with a separate project. Here, the insureds were general contractors retained by a city to perform work at a municipal construction project. The city sued the insureds in connection with certain defects at the project. The carrier denied coverage based on the policy's breach of contract exclusion and commenced a declaratory judgment action against the insureds seeking a declaration of no coverage. The court in this action found that the carrier owed a duty to defend in connection with the underlying action. However, the Southern District's holding in *Huser*, *supra* prompted the carrier to file a motion for reconsideration.

The court granted the carrier's motion for reconsideration and found that the breach of contract exclusion nullified coverage for the insureds in connection with the city's action. However, upon reconsideration, the court maintained its position that an interpretation of the exclusion that was narrower than that maintained by the Southern District was appropriate. The court based this holding on an ambiguity created by the subcontractor exception to the your work exclusion, which preserved coverage for damages to work performed by subcontractors. The court found that the breach of contract exclusion should be read to apply only to damage resulting from a breach of contract by the insured (as opposed to an insured's subcontractor). Notwithstanding this narrower interpretation, the court applied the allegations in the underlying complaint to this reading of the exclusion to find that because "all of the alleged property damage *was causally attributable*" to the insureds' alleged breach of contract (as opposed to having been caused solely by the insureds' subcontractors), coverage was barred by the exclusion.

Mt. Hawley Ins. Co. v. Slay Engineering, No. 5-18-cv-00252-OLG, 2019 U.S. Dist. LEXIS 125295, 2019 WL 3315440 (W.D. Tex. June 27, 2019).

In this action, one of the defendants in *Mt. Hawley Ins. Co. v. Slay Engineering*, 390 F.Supp.3d 794 (W.D. Tex. June 13, 2019), who was a member of the joint venture acting as general contractor for the project, sought reconsideration of that prior order on the basis that the allegations of the complaint as they related to that defendant did not fall squarely within the policy's breach of contract exclusion. The court denied the defendant-insured's motion, finding that the allegations that the insured had a contractual obligation to correct defective work by subcontractors, and that it failed to do so, were sufficient to trigger the application of the breach of contract exclusion.

Liberty Surplus Ins. Corp. v. Century Sur. Co., No. CV H-18-1444, 2019 U.S. Dist. LEXIS 116093, 2019 WL 3067504 (S.D. Tex. July 12, 2019).

The insured was a general contractor retained by a city to construct a public library. The city sued the insured for breach of contract, breach of warranties, and negligence in connection with a leaky roof at the constructed library, which went unabated for seven years. The leaks were allegedly caused by the insured's and its subcontractor's defective work at the project. At arbitration, the city was awarded $1.5 million, which the insured asked its liability carrier to cover. The carrier denied any obligation to indemnify the insured for the arbitration award and commenced this declaratory judgment action.

At issue in the declaratory judgment action was whether the damages associated with the cost of repairing or replacing the insured's work were covered under the policy. The carrier argued that the insured's defective work does not constitute "property damage," as is necessary to trigger coverage. The insured, however, argued that the cost of repairing the faulty workmanship is covered if the faulty workmanship resulted in "physical injury" to tangible property. Specifically, the insured argued that because the defective roof caused interior water damage, both the costs of remediating the interior damage and the cost of replacing the defective roof were covered. In analyzing these arguments, the court sided with the carrier, finding that the carrier was not obligated to indemnify the insured for costs associated with the repair and replacement of its own work. However, the court permitted additional discovery to proceed to determine which portions of the award related to property damage resulting from the water intrusion, including damage to certain ceiling tiles as opposed to damage to the roof itself.

Virginia

W. World Ins. Co. v. Air Tech, Inc., No. 7:17-CV-518, 2019 U.S. Dist. LEXIS 53683, 2019 WL 1434666 (W.D. Va. Mar. 29, 2019).

The insured entered into a contract to supply a solvent recovery chiller as part of a construction project. The chiller was delivered and installed but soon thereafter failed to work properly, requiring the insured's customer to replace the chiller. The customer later filed suit against the insured alleging the insured "breached its duty to provide material and equipment and provide for the installation of the chiller." In the customer's amended underlying complaint, it further alleged that the insured negligently failed to accurately describe the equipment, components, and electrical connections. The insured tendered the underlying complaint and amended complaint to its CGL carrier, which agreed to defend under a reservation of rights and filed this subject declaratory judgment action seeking a declaration it had no duty to defend or indemnify. The parties filed cross motions for summary judgment.

As an initial matter, the insured attempted to persuade the court that it need not be limited by Virginia's "Eight Corners Rule" and could consider documents extrinsic to the underlying complaint and amended complaint if the documents demonstrate that an underlying third-party claimant could assert a potentially covered claim. After reviewing mandatory Virginia law, the court concluded that it was bound to examine only the complaint and the policy. According to the court, this case turned on whether damage to the chiller qualifies as an occurrence under the carrier's policy. The court concluded that the customer's underlying complaint and amended complaint solely advanced claims that the insured poorly performed its contractual obligations resulting in damage to the insured's chiller and the customer was only seeking damages to replace the chiller. Thus, under Virginia law, the customer's allegations were limited to the contractual relationship between the insured and its customer, which the customer claimed the insured breached. The court held such allegations were not covered by the policy, as among other things, such damage is not accidental and in turn does not constitute an "occurrence" under the policy even though a cause of action for negligence was alleged. As such, the court granted the carrier's motion seeking a declaration it has no duty to defend or indemnify the insured for the costs to replace the chiller. ■

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