MEALEY'S® LITIGATION REPORT

Construction Defects Insurance

Construction Defect Claims: A 2020 Update Part II

by
Thomas F. Segalla,
Michael T. Glascott,
Ashlyn M. Capote,
Adam R. Durst,
Sean P. Hvisdas
and
Jason E. Rusche

Goldberg Segalla LLP
Buffalo, NY

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Commentary

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[Editor's Note: Thomas F. Segalla and Michael T. Glascott are partners and Ashlyn M. Capote, Adam R. Durst, Sean P. Hvisdas, and Jason E. Rusche are associates at Goldberg Segalla LLP. Part I appeared in the November 2020 issue of Mealey's Litigation Report: Construction Defects Insurance. Any commentary or opinions do not reflect the opinions of Goldberg Segalla LLP or LexisNexis®, Mealey Publications™. *Responses are welcome.]*

Introduction

In Part I of this publication, the authors discussed insurance coverage construction defect cases from the first half of 2020. Many cases highlighted the willingness of some courts to determine whether a contractor's work performed by a subcontractor is germane to determining whether any "occurrence" is alleged in the action against the contractor. That precise issue was analyzed by an Arizona federal court in United Specialty Ins. Co. v. Dorn Homes Inc., discussed below.

In Part II, the authors discuss cases from the latter part of 2020 which, unsurprisingly, provide analysis of the trigger of coverage in construction defect cases and the application of the business risk exclusions. Notably, many decisions address issues related to when the damage occurred for purposes of determining whether the damage occurred during the policy period or whether a policy provision limiting coverage for continuing loss applies. For example, in Interstate Fire & Cas. Ins. Co. v. First Specialty Ins. Co., the court concluded the relevant inquiry is when the property damage (as opposed to the occurrence) actually occurred.

This case and many others are discussed below.

Arizona

United Specialty Ins. Co. v. Dorn Homes Inc., No. CV-18-08092-PCT-MTL, 2020 U.S. Dist. LEXIS 138431 (D. Ariz. Aug. 4, 2020).

Questions of Fact Regarding Whether Damage Resulted from an Occurrence

The insured developer constructed 250 single-family residential homes between 2012 and 2017. The insured hired subcontractors to perform all of the construction work. Thereafter, the developer received complaints of damage in the homes, including water infiltration, exterior wall cracking, interior wall, ceiling and flooring cracking, and separation and roof truss lift. The insured ultimately paid for repairs and corrections at 87 of the homes and, at the request of the insurer's retained coverage counsel, submitted

costs relating to five of the homes. This coverage action followed because the insurer asserted it had no obligation to indemnify the insured for the repairs, or no indemnity obligation with respect to portions of the repairs, as there were no allegations of "property damage" caused by an "occurrence" and coverage was otherwise barred by various policy exclusions. The parties filed cross motions for summary judgment.

The court held that there were genuine issues of fact regarding the existence of an "occurrence" under the policy to be reserved for trial, but granted the insured's motion with respect to the applicability of the exclusions. The insured claimed that costs incurred were to repair the roof truss and foundational lift damages that were caused by its subcontractors' defective ventilation and drainage work. The insurer maintained that repairs were undertaken as measures to correct defective workmanship and not property damage to other non-defective property. The court held that there were issues of fact regarding whether the repairs made to the attics of the impacted homes and the repairs to the drainage work were repairs to remediate resulting damage and prevent further resulting damage or costs to correct defective work. The court noted that the parties had differing views of the scope of "resultant damage." The court next rejected the insured's argument that faulty workmanship by an insured standing alone, and in light of the policy's exception for subcontractor faulty work in the Your Work Exclusion, constituted an "occurrence" holding that under applicable Arizona law, it did not. The court followed Arizona precedent in holding that although the cost of preventative measures alone are not necessarily covered damages under a CGL policy, when an insured proves there is covered property damage separate from the costs of the preventative measures, only then will costs incurred in conjunction with the costs to repair covered property damage be covered by the policy. The court denied the parties' cross motions on this issue based on the issues of fact.

The court held the policy's Real Property Exclusion and Your Work Exclusion did not apply because they only apply to claims of damages resulting from ongoing operations and there was no genuine issue that the operations at the damaged homes were completed. The court held that the Your Product Exclusion did not apply because the defectively chosen decorative gravel that contributed to ponding fell within the exclusion's exception for "real property" because it was an improvement or a fixture. The court held the policy's Impaired Property Exclusion did not apply because there was no "impaired property" as defined by the policy. Therefore, the court granted the insured's cross motion and determined that none of the exclusions barred coverage.

California

Engineered Structures, Inc. v. Travelers Prop. Cas. Co. of Am., 822 Fed. Appx. 606 (9th Cir. 2020).

Exclusion for Defective Construction is Valid and Unambiguous

The insured was retained to build a fueling station for the property owner. Damages occurred when an underground fuel storage tank "floated" in a "wet" excavation hole before it was completed installed. The insured sought coverage for these damages under a builders-risk policy. The insurer investigated the claim and determined the damage resulted from the insured's subcontractor not placing enough water into the tank to prevent floatation. The insurer thereafter disclaimed coverage in connection with the loss based on the exclusion for "faulty, inadequate or defective workmanship [or] construction" within the builder's risk policy. The insured disputed the coverage denial and commenced a coverage action against the insurer.

The district court determined that the exclusion was ambiguous because the term faulty "workmanship" could be read to exclude only losses caused by flawed products, as opposed to excluding losses caused by a flawed process. The court read the exclusion in favor of the insured, and held that the "product" interpretation rendered the exclusion inapplicable because the damages did not occur from a flaw in the storage tank. The Fifth Circuit, however, reversed the district court's decision, holding that, notwithstanding the district court's interpretation of the term "workmanship," the term "construction" within the exclusion has an unambiguous, process-oriented meaning. The Fifth Circuit thereafter remanded the case to the district court to determine whether the subject loss was caused by or resulted from faulty, inadequate, or defective construction.

Cmb Developers v. Associated Indus. Ins. Co., No. 2:19-cv-09973, 2020 U.S. Dist. LEXIS 167915 (C.D. Cal. July 24, 2020).

Exclusion for Damage Arising out of Insured's Work for "Fire Suppression Systems – Installation" is Ambiguous

The insured-contractor was retained to remodel a home, which included replacement of the roof and the fabrication and installation of a fire sprinkler system. Upon completion of the remodel, the home was sold to an individual. Two years after the remodel was complete, the sprinkler system malfunctioned, causing $300,000 damage to the property. The new homeowner sued the insured for the damage, and the insured sought coverage under its liability policy that was in effect at the time of the construction. The insurer, however, denied coverage under an exclusion, which barred coverage for property damage within the products-completed operations hazard and arising out of the insured's work for "Fire Suppression Systems – Installation."

The insured disputed the insurer's coverage position, arguing the exclusion only applied to incidents arising from negligent installation of the fire suppression system, and that damage not stemming from negligent installation is covered. The court found that the insurer's exclusion was ambiguous because the exclusion could be read to apply to damage occurring as a result of a fire suppression system's faulty installation (i.e., the insured's position) or all damage created by a malfunctioning fire suppression system (i.e., the insurer's position). The court resolved the ambiguity in favor of the insured, and held that because there was a possibility that the incident was caused by something other than a negligent installation (e.g., improper roof ventilation), the insurer had a duty to defend.

Interstate Fire & Cas. Ins. Co. v. First Specialty Ins. Co., No. 2:17-cv-01795, 2020 U.S. Dist. LEXIS 158229 (E.D. Cal. Aug. 31, 2020).

Coverage May Be Triggered Even When Complaint Does Not Reference Date of Alleged Property Damage

This was a declaratory judgment action between two insurers in connection with six underlying construction defect claims, three of which were venued in California, with the other three venued in Nevada. The insurers purportedly provided coverage to various mutual insureds, each of whom were subcontractors, in connection with various underlying projects and who were sued by owners and general contractors of those projects for certain construction defects. The plaintiff-insurer sued the defendant-insurer seeking a declaration that the defendant-insurer was obligated to defend and indemnify their mutual insureds in connection with the underlying actions. The defendant-insurer, however, raised various defenses to coverage in connection with those claims.

When determining the defendant-insurer's duty to defend, the court applied the law in which the particular underlying action was venued. Therefore, for the Nevada cases, the court applied the four corners rule, which generally precludes consideration of facts extrinsic to the complaint when determining a duty to defend, subject to few exceptions. The primary issue with regard to the defendant-insurer's defense obligation in the Nevada cases was (1) whether there was any alleged property damage during the subject policy period, and (2) whether the subject damage fell within a Prior Completed Work Exclusion. These were issues because each complaint was devoid of allegations as to when the alleged property damage actually occurred—though one case also involved a defense involving a Condominium or Townhouse Exclusion. The court found that in each case the relevant complaint was devoid of allegations of when the alleged property damage occurred and therefore devoid of the allegations necessary to trigger the relevant exclusions. Thus, the court concluded that there was a reasonable possibility that the defendant-insurer's coverage could be implicated, and its duty to defend was triggered, notwithstanding the extrinsic evidence the defendant-insurer sought to use to demonstrate otherwise.

In contrast, in the sole California case under which the plaintiff-insurer sought a determination on the defendant-insurer's defense obligation, the court determined it was permitted to use extrinsic evidence to determine a duty to defend under California law. Notwithstanding, the court found that all of the evidence considered demonstrated a reasonable possibility that the underlying plaintiffs' claim regarding defects that caused damage to their homes and their component parts outside of the insured's work sufficiently alleged "property damage" caused by an "occurrence" sufficient to trigger the defendant-insurer's defense obligation.

As it pertains to the court's decision on the defendant-insurer's defense obligation, the court noted no difference between California and Nevada law. A common issue among many of the cases was when the alleged property damage occurred. The court noted that, as a general rule, the occurrence of property damage from construction work under CGL policies is not the time of the wrongful act, but the time the property damage actually resulted. In applying this rule to those matters where the date of the alleged property damage was in dispute, the court found that the defendant-insurer failed to submit sufficient evidence to raise a triable issue of fact as to whether the damages are actually covered.

Nat'l Union Fire Ins. Co. v. Rudolph & Sletten, Inc., No. 20-cv-00810, 2020 U.S. Dist. LEXIS 126510 (N.D. Cal. July 17, 2020).

Stay of Coverage Action Related to Action Alleging Construction Defects was Proper

This coverage dispute pertained to an Owner-Controlled Insurance Program (OCIP) arising out of an underlying construction defect action commenced by the owner of a store where flooring installed by the insured-contractors was cracking. The OCIP insurers commenced a coverage action against the insured-contractors seeking a declaration of the parties' rights and obligations underlying the policies. At issue was whether the insured-contractors were entitled to stay or dismiss the coverage litigation to (1) avoid needless determination of state law issues; (2) discourage litigants from filing declaratory actions as a means of forum shopping; and (3) avoid duplicative implications (referred to therein as the Brilliant Factors).

For the first factor, the court determined that the information required to determine the issues set forth in the coverage action (the existence of an "occurrence," application of the builders' risk exclusions, and application of the professional liability exclusion) were heavily dependent on facts to be determined in the underlying property damage action, weighing in favor of the stay. The court found that the second factor was neutral, but that the third factor weighed in favor of a stay because to determine the coverage issues presented by the OCIP insurers required the court to address facts that were substantially similar to those at issue in the underlying action. Relying on these determinations, and even after further applying California's state regarding whether to stay the proceeding (in dicta), the court determined that the coverage action related to the underlying construction defect claim such that it should properly be stayed.

Premier Constr. & Romde v. Mesa Underwriters Special Ins. Co., No. EDCV 18-2582, 2020 U.S. Dist. LEXIS 168120 (C.D. Cal. July 8, 2020).

Failure to Return Claimant's Property Not "Property Damage" Caused by an "Occurrence"

The insured was a contractor hired by a property owner to perform certain work at the owner's home. The owner sued the contractor for breach of contract, restitution, fraud, and negligence, though the owner's negligence claim was dropped from its amended complaint. In relevant part, the owner alleged that the contractor failed to return the owner's personal property to the jobsite, including, but not limited to, keys to the residence, the garage-door opener, and construction materials. The contractor requested coverage from its liability insurer in connection with the owner's suit, but the insurer denied coverage on the basis that the suit did not allege "property damage" caused by an "occurrence," and that the claim fell within certain business risk exclusions within the policy (specifically j(5) and (6)).

After being provided with the owner's responses to specific interrogatories in which he detailed specific property damage to his residence as a result of the contractor's work, the insurer agreed to defend the contractor subject to a reservation of rights. The insurer, however, refused to reimburse the insured for fees and costs incurred in the contractor's defense of the claim that pre-dated its receipt of the relevant interrogatories. The insurer also contributed $130,000 to settle the insured's claim with the owner, but later requested reimbursement of a majority of that settlement from the contractor. Both of these issues were addressed in subsequent coverage litigation.

As it relates to the costs incurred by the contractor for which the insurer refused to reimburse, at issue was whether such payments were incurred on a voluntary basis. The court determined that those fees incurred prior to providing notice to the insurer were very clearly incurred on a voluntary basis. However, its analysis as to whether those costs incurred between

when the insurer issued its initial disclaimer of coverage to when it received the referenced interrogatories that caused it to change its opinion was based on whether the insurer's initial denial was proper. In rendering this analysis, the court determined that the owner's claims based on the contractor's failure to return construction materials and keys in fact did not allege "property damage" caused by an "occurrence," and because the insurer's original denial was "not unwarranted," costs and fees subsequently incurred were deemed precluded by the policy's no-voluntary payment provision.

With regard to the insurer's request for reimbursement of its settlement contribution, the court found that the insurer failed to establish such entitlement because it failed to satisfy the prerequisites necessary to do so. In other words, the insurer failed to provide "(1) a timely and express reservation of rights; (2) an express notification to the insureds of the insurer's intent to accept a proposed settlement offer; and (3) an express offer to the insureds that they may assume their own defense when the insurer and insureds disagree whether to accept the proposed settlement."

Florida

Orange & Blue Constr., Inc. v. HDI Global Specialty SE, No. 19-cv-81707, 2020 U.S. Dist. LEXIS 155160 (S.D. Fla. August 25, 2020).

Court Refuses to Evaluate Extrinsic Evidence

The plaintiff in this declaratory judgment action was a subcontractor that hired a sub-subcontractor to perform certain work. The sub-subcontractor hired another individual to do the work. When the general contractor filed suit against various entities for faulty construction, the plaintiff sought coverage as an additional insured under the policy issued to the sub-subcontractor. The sub-subcontractor's insurer asserted that there was no coverage because the work was performed by another individual instead of the sub-subcontractor.

There was also a question about when the damage occurred and whether there was coverage under a 2016 policy. The insurer argued that only the 2015 policy was relevant because the pertinent question was when the deficient work was performed. The court explained that the correct inquiry was whether, based on the allegations, it was possible that the damage could have occurred during the 2016 policy period.

To answer the question about whether the damage was covered even though it was performed by another individual instead of the sub-subcontractor, the court focused on Florida's rule limiting a coverage assessment to the allegations in the complaint. The court rejected the argument that it should look to extrinsic evidence and determined that it could only do so when the extrinsic evidence made it obvious that there was no duty to defend. Because it was unclear whether the individual performing the work was an independent contractor and therefore whether a condition precedent was satisfied, the court concluded that the insurer had an obligation to defend the plaintiff, but that the issue of indemnity and damages would be stayed pending findings in the underlying action.

Southern-Owners Ins. Co. v. MAC Contrs. of Fla., Inc., 819 Fed. Appx. 877 (11th Cir. Fla. July 29, 2020).

Work Performed by Subcontractors

This construction defect matter has an extensive history that the authors have discussed before. The insured in this matter was the general contractor involved with constructing a custom residence. At some point, the insured and the owners encountered problems, and the owners served a notice of defects before eventually filing suit. After initially agreeing to defend its insured, the general contractor's insurer disclaimed coverage because it asserted that the complaint against the insured did not allege any "property damage."

In June 2018, the federal district court initially granted the insurer's motion for summary judgment on the basis that coverage was excluded by the policy's Damage to Your Work Exclusion, and we previously discussed that decision in the March 2019 version of this publication. However, that decision was reversed by the Eleventh Circuit in 2019, which we discussed in the March 2020 version of this publication.

In January 2020, the district court once again concluded that the insurer had no obligation to defend its insured, but this time made the decision based on its determination that the underlying complaint did not contain any allegations of "damage beyond the faulty

workmanship or defective work which damaged otherwise non-defective components of the project" and thus failed to allege any covered "property damage." We discussed that decision in the October 2020 version of this publication.

The case came before the Eleventh Circuit once again, and in July 2020, the court again vacated the district court's decision. The court explained that under its decision in Carithers v. Mid-Continent Cas. Co., 782 F3d 1240 (11th Cir. 2015), whether "property damage" occurred depends on whether the work was performed by subcontractors. The court concluded that the operative complaint alleged that the insured's subcontractors had performed work on the property but did not clearly explain which entity had performed which work that was allegedly damaged. Because it was unclear, it was possible that the complaint against the insured alleged covered "property damage."

Hawaii

Nautilus Ins. Co. v. RMB Enters., No. 19-00496 JAO-RT, 2020 U.S. Dist. LEXIS 200468 (D. Haw. Oct. 28, 2020).

Occurrence Coverage Trigger

This coverage dispute arose from an underlying action brought by owners of a ranch that allegedly sustained water damage several years after construction. The owners sued the insured, which had contracted for the development and construction of the property. The insured's CGL carrier reserved its right to deny coverage in the underlying action based on a variety of policy provisions, including that the action did not allege "property damage" that resulted from an "occurrence," and because coverage was excluded under the policies' Contractual Liability Exclusion, Damage To Your Work Exclusion, and Impaired Property Exclusion.

The insurer then brought this declaratory judgment action seeking a determination that no coverage was owed to its insured. When its insured failed to appear in this action, the owners intervened as interested parties. The insurer then filed this motion for summary judgment, which the court granted. In its analysis of whether an "occurrence" was alleged, the court explained that it is necessary to determine whether the claims are based on a contractual relationship or an independent tort claim. Here, the claims were predicated upon the duty of care that the insured allegedly owed the owners pursuant to their agreement. Therefore, there was no "occurrence" alleged. The court further explained that there was no damage to any property outside of the insured's work product, so coverage was not triggered.

Because coverage was not triggered in the first instance, the court declined to analyze the various policy exclusions.

Illinois

Bldrs. Concrete Servs., LLC v. Westfield Natl. Ins. Co., No. 19 C 7792, 2020 U.S. Dist. LEXIS 167145 (N.D. Ill. Sep. 14, 2020).

Right to Independent Counsel

The insured contractor was hired as a subcontractor to perform concrete work for the construction of a new apartment building, including the pouring of concrete columns. One of the columns buckled shortly after being poured, and litigation between the general contractor and the insured subcontractor ensued. The general contractor alleged that the collapse of the column caused damage to other property outside the scope of the insured's work. The insured tendered the lawsuit to its CGL insurer, which agreed to defend but reserved its rights to disclaim coverage based on the potential applicability of the business risk exclusions. The insurer assigned defense counsel to represent the insured, but the insured rejected assigned counsel and maintained that it would exercise its right to independent counsel of its own choosing but at the insurer's expense because the insurer's reservation of rights created a conflict of interest. The insurer disagreed, and the insured brought a declaratory judgment action. The parties filed cross motions for summary judgment.

The court held that an insurer has the exclusive right to control the defense of its insured unless there is an "actual conflict" between the insurer's interests and the insured's. Here, because no actual conflict between the insurer's and the insured's interest regarding coverage for alleged damages existed and there was merely a "potential conflict," the insured had no right to independent counsel. The court followed the Seventh Circuit's decision in Natl. Cas. Co. v. Forge Indus. Staffing, Inc., 567 F.3d 871 (7th Cir. 2009),

which explained that an "actual conflict" only exists when the underlying complaint contains two mutually exclusive theories of liability, one covered and one uncovered. The court noted that the standard requires an insured to demonstrate that in making strategic decisions relating to its defense, the insurer could avoid any responsibility to indemnify for the underlying judgment and shift all losses to uncovered categories. Unless the insurer, through its counsel, can manipulate the course of the underlying lawsuit in such a way that coverage is completely eliminated for any ultimate judgment, the insured is not entitled to independent counsel. Said differently, if different results in the underlying lawsuit only affect the relative responsibility of the insurer and insured for a judgment without altogether eliminating coverage, the insured is not entitled to independent counsel. Here, because the insured and the insurer agreed that at least some of the alleged damages fell within the policy's coverage, there was no actual conflict and the court held the insured was not entitled to independent counsel.

W. Bend Mut. Ins. Co. v. Trapani Constr. Co., No. 191772-U, 2020 Ill. App. Unpub. LEXIS 1783 (Ill. App. 2020).

Occurrence and Voluntary Payments

This coverage action concerned a dispute over coverage for an additional insured. The developer and general contractor hired the insured subcontractor to perform masonry work and install balconies at a condominium complex. The construction of the complex was completed in or about 2005, and thereafter the board of directors for the condominium complex began noticing water infiltration and damage to the interior of the building's common areas and owner units. The board filed suit against the general contractor and the subcontractor alleging that construction defects caused the damage. Ultimately, the board settled the litigation, and the insurer for the general contractor contributed $145,000. The subcontractor's CGL insurer defended the subcontractor in the underlying lawsuit. The general contractor had sought coverage for the litigation from the subcontractor's CGL insurer, but the subcontractor's insurer denied coverage and filed a declaratory judgment action seeking a declaration that it had no duty to defend because the underlying lawsuit did not allege "property damage" caused by an "occurrence" as required by the policy. The subcontractor's insurer also alleged that the general contractor's settlement of the claims was not costs incurred for "a covered loss made in reasonable anticipation of liability." The parties filed cross motions for summary judgment, and the trial court granted the general contractor's motion finding the subcontractor's insurer had a duty to defend and indemnify the general contractor.

On appeal, the Illinois Appellate Court affirmed. The court held that the underlying lawsuit alleged physical damage to property other than the cost to repair and replace the faulty workmanship that caused the water infiltration. The court rejected the subcontractor's insurer's argument that the board lacked standing to assert claims of property damage to the unit owners' personal property, which was not litigated in the underlying lawsuit, and that the possibility of indemnity coverage remained. The court held that the subcontractor's insurer also had a duty to indemnify the general contractor for the settlement because the alleged damage was not speculative and covered claims were the primary focus of the settlement.

Maryland

Jowite v. Fed. Ins. Co., No. DLB-18-2413, 2020 U.S. Dist. LEXIS 147376 (D. Md. Aug. 14, 2020).

Exclusions for Settling and Faulty Design in an All-Risk Policy

The plaintiff in this action was the owner of an apartment building that had experienced settlement. The building had been built in the 1980s, and issues with settlement had been discovered in 2013, 2015, and 2017. Remedial work had been performed throughout that period as well. In 2017, the plaintiff filed an insurance claim with its all-risk insurer, which hired an expert to inspect the premises and then denied coverage as a result of the inspection. The insurer asserted that the policy's defective design exclusion and settling exclusion both operated to bar coverage.

Ultimately the question at issue in the litigation was whether each provision's ensuing loss exception restored coverage. The court analyzed the recent decision in Bethany Boardwalk Group LLC v. Everest Sec. Ins. Co., 2020 U.S. Dist. LEXIS 38427, No. ELH-18-3918 (D. Md. Mar. 5, 2020) and specifically the analysis of

the policy language that for the ensuing loss exception to apply, the damages must be caused by a peril not otherwise excluded. The insured had argued that the exception applied because the cause of the damages to the building was a collapse, but there was no question that the collapse, if any, was a result of the faulty design and settlement. Therefore, both exclusions applied.

Montana

W. Am. Ins. Co. v. MVP Holdings, LLC, No. CV 20-59-M-DWM, 2020 U.S. Dist. LEXIS 217037 (D. Mont. Nov. 19, 2020).

Claims Alleging Pure Economic Loss Not Covered

A property owner counterclaimed against a contractor alleging that the contractor purposefully underbid a contract so it could issue change orders later. The contractor's insurer defended under a reservation of rights and filed a declaratory judgment action. The court agreed with the insurers that the counterclaim did not allege covered damages because it alleged pure economic loss. Additionally, the court ruled that the insurers could recoup their fees because they provided a timely, explicit reservation of rights to recuperate the defense costs in the underlying action.

Nevada

Arizona Civ. Constructors v. Colony Ins. Co., 481 F. Supp. 3d 1141 (D. Nev. 2020).

Definition of an Occurrence and Business Risk Exclusions

A general contractor filed suit against its customer in connection with its remodel of the customer's nightclub, and the customer filed a counterclaim. The counterclaim alleged the contractor performed defective and non-conforming work; abandoned the project after completing less than 50% of it; submitted fraudulent invoices for work; failed to pay subcontractors; performed unpermitted, substandard and unauthorized work; and exceeded the approved budget. The customer claimed that finishing the remodel would likely require it to remove and reconstruct much of the completed work. The contractor tendered the customer's counterclaim to its general liability insurer, which had issued an artisan contractor insurance policy that contained standard CGL terms. The insurer declined to defend, and the contractor settled the claims for $940,000. The contractor then brought a declaratory judgment action against the insurer.

The insurer filed a motion to dismiss asserting that the underlying counterclaim failed to allege "property damage caused by an occurrence" as required by the subject policy and in the alternative any coverage for alleged damage was precluded by the policy's business risk exclusions, which generally preclude coverage remediation of the insured's own work. The court acknowledged that the Nevada Supreme Court has not spoken to whether faulty workmanship constitutes an "occurrence" under a CGL policy, but explained that the court had interpreted the term to mean "a happening that is not expected, foreseen or intended." Adopting other Nevada courts' reasoning, the court held that faulty workmanship did not constitute an occurrence where the faulty workmanship did not cause other independent property damage.

Here, the court held the contractor had failed to plausibly allege that its allegedly faulty workmanship caused damage to property other than the insured's work. Additionally, the other allegations concerned expected, purposeful, and intended conduct that also did not constitute an "occurrence." The court went on to conclude that even if it did determine that the allegations of the counterclaim constituted an "occurrence," the alleged conduct and resulting damage fell squarely within the business risk exclusions of the policy. The court granted the insurer's motion to dismiss, but gave the contractor leave to amend its complaint.

New Jersey

Bob Meyer Cmtys. v. Ohio Cas. Ins. Co., No. A-4526-18T3, 2020 N.J. Super. Unpub. LEXIS 1873 (N.J. App. Div. Oct. 5, 2020).

Carrier within Right to Contest Coverage

The insured was the general contractor hired to build several homes, and the homeowners filed suit following water infiltration and other damages issues. The insured's CGL insurer denied coverage because there was no "property damage" caused by an "occurrence." The trial court agreed and granted the insurer summary judgment, but the appellate division reversed the decision because some of the work had been performed by a subcontractor, but ultimately made no decision with respect to the issue.

However, in the meantime, the insured settled various lawsuits, but because there were multiple insurance policies involved, including one from a different CGL insurer, the timing of any alleged "occurrence" and resulting damages became critical. The lower court had barred the testimony of the insured's expert with respect to these issues, but the appellate division again reversed.

Thereafter the parties again filed motions for summary judgment, and the insured sought reimbursement for the settlements it had entered into with the various homeowners. The trial court concluded that the insurer's policies were implicated, but there were questions regarding the reasonableness of the settlements. Ultimately, the parties entered into a high-low settlement agreement. In this appeal, the insured asserted that the lower court wrongfully denied coverage, but the court disagreed and determined that the insurer was within its right to contest coverage and that the issues impacting whether there was coverage under the policies needed to be resolved by a factfinder.

New York

AIG Prop. Cas. Co. v. Farm Family Cas. Ins. Co., No. 156408/2019, 2020 N.Y. Misc. LEXIS 10288 (N.Y. Sup. Ct. Dec. 1, 2020).

Subrogation Claim against Contractor for Resulting Damage

Plaintiff-insurer issued a first-party policy to homeowners who made a claim after a contractor damaged some of the rugs in their home. Following payment of the claim, the plaintiff-insurer sued the carpet contractor and obtained a default judgment. Thereafter, the plaintiff-insurer sought to execute that judgment against the carpet cleaner's insurer. The defendant-insurer asserted that there was no coverage based on the policy's exclusion for incorrect performance and the exclusion for damage to the insured's work. The plaintiff-insurer countered that the exclusion did not apply to completed operations. Ultimately, the court concluded that the policy's performance exclusion did apply to bar coverage.

101 W. 78th, LLC v. New York Mar. & Gen. Ins. Co., No. 650393/2017, 2020 N.Y. Misc. LEXIS 4724 (N.Y. Sup. Ct. Aug. 21, 2020).

Additional Insured Coverage under the General Contractor's Policy

The plaintiff in this declaratory judgment action was a building owner that sought coverage from its general contractor's CGL insurer. The owner had hired the general contractor for certain renovation work, but then was sued by its commercial tenant following alleged damage. The owner sought coverage as an additional insured under the general contractor's policy. The insurer had denied coverage because the underlying complaint did not allege any "property damage" resulting from an "occurrence" and also based on the policy's prior work exclusion.

The court had previously determined that the insurer had an obligation to defend the general contractor based on the allegations in the complaint and specifically because the tenant had alleged water leaks and other damages that had resulted in millions of dollars in damages. The court ultimately determined that there was coverage for the owner for many of the same reasons. Specifically, it did not matter that the tenant had not specifically alleged that the general contractor was negligent because the allegations demonstrated it was possible that the damages were a result of the general contractor's actions. The court also rejected the insurer's argument that there was no coverage because the negligence cause of action had been dismissed.

Pennsylvania

Atain Ins. Co. v. Xcapes & Craig Lesser, No. 2:19-cv-05346, 2020 U.S. Dist. LEXIS 127707 (E.D. Pa. July 20, 2020).

Faulty Workmanship not an Occurrence

A contractor agreed to perform certain work to the pool and spa area of a residence, which included repairing or replacing work that the contractor improperly performed under an earlier contract. The homeowners were upset with the quality of the work and refused to pay the contractor the balance of a contract. As part of underlying litigation, the homeowners sought damages from the contractor for the allegedly improper work, and the contractor sought defense and indemnity from its CGL insurer. The Eastern District of Pennsylvania reviewed the claim and found that the underlying complaint against the contractor alleged faulty workmanship. Because faulty workmanship is not an "occurrence," the court found that the carrier had no obligation to defend or indemnify the contractor for the homeowners' claims.

Nautilus Ins. Co v. 200 Christian St. Partners LLC, 819 Fed. Appx. 87 (3d Cir. 2020).

Coverage Triggered Where Contractor Used Allegedly Defective Products

A pair of underlying complaints alleged that homeowners suffered damages due to faulty workmanship and a contractor's use of defective products, such as windows. One of the defendant-contractors' carriers issued a CGL policy and argued, in ensuing coverage litigation, that the underlying complaints sounded in faulty workmanship and, therefore, failed to constitute an "occurrence." The Third Circuit, agreeing with the district court, found that the allegations of "product-related tort claims" fell within the scope of the carrier's coverages. Specifically, the Third Circuit found that the underlying actions alleged that the contract used defective materials and that products supplied by the contractor suffered an active malfunction, and that these allegations triggered coverage.

Burlington Ins. Co. v. Shelter Structures, Inc., No. 19-4857, 2020 U.S. Dist. LEXIS 162237 (E.D. Pa. Sep. 4, 2020).

Faulty Design Causing Collapse Not Covered

A carrier sought a declaratory judgment that it had no obligation to defend or indemnify its insured in an action alleging the insured improperly constructed a structure. The structure had collapsed, causing property damage to an aircraft stored inside, and the aircraft owner had sued the insured in an underlying lawsuit. The insured argued that a windstorm caused a collapse, thereby constituting an "occurrence" sufficient to trigger coverage. The court disagreed, finding that the underlying complaint alleged that the structure failed in winds below the design requirements of the applicable building code and the actual wind forces were less than half of what the hangar should have been constructed to resist. Thus, the court found that the underlying complaint alleged claims of faulty workmanship and did not constitute an occurrence.

South Carolina

Atain Specialty Ins. Co. v. Carolina Professional Bldrs., LLC, No. 2:18-cv-2352-BHH, 2020 U.S. Dist. LEXIS 183205 (D.S.C. Oct. 2, 2020).

Continuous and Progressive Injury Limitation

The carrier sought a declaratory judgment that the policy issued to its insured-contractor did not provide coverage for a construction defect lawsuit due to a Continuous and Progressive Injury Limitation that excluded damages known to any person prior to the policy period. The district court, looking to discovery from the underlying action, found in favor of the insurer. Specifically, the court rejected arguments from the underlying plaintiff and the insured regarding disputed facts over the timing of the discovery of the alleged damages, noting that discovery of the alleged damages by the insured prior to the policy period would require the insured to report the damages to the carrier, and discovery by the plaintiff prior to the alleged policy period would subject the underlying action to a statute of limitations defense.

Cincinnati Ins. Co. v. Charlotte Paint Co., No. 2:18-cv-657-BHH, 2020 U.S. Dist. LEXIS 188710 (D.S.C. Oct. 9, 2020).

That Particular Part of the Contractor's Work

A stucco contractor allegedly damaged other subcontractors' work during its repairs and failed to repair the damage it caused, leading to other damages. In a declaratory judgment action regarding the duty to indemnify, the insurer and a general contractor argued over the scope of the "business risk" exclusions for "your work" under a CGL policy. The insurer contended that the exclusion was broad enough to include not only the specific work an insured is hired to do, but also the area where an insured damages while performing such work. The contractor argued that the exclusions' use of the phrase "that particular part" limited the applicability of the exclusions only to the actual work performed by the insured and did not expand to other trades' work. The court agreed with the insurer, finding that the contractor, by necessity, had to install its work onto work by other trades and, therefore, any damage to the other subcontractors' work fell within the scope of the exclusions.

Texas

Atain Specialty Ins. Co. v. Siegen 7 Devs., L.L.C., 820 Fed. Appx. 270 (5th Cir. 2020).

Damage to Claimant's Personal Property from Contractor's Defective Work Was Covered, but Not the Work Itself

The insured-contractor was retained by an individual to build a house. During construction, the home flooded, causing damage to the interior of the home and the individual's property therein. The flood was allegedly caused by the insured's failure to construct the house in accordance with its contract with the individual, which required provision of a positive storm water drainage for the lot, a drainage plan for the house and lot, and compliance with the International Building Code regarding drainage and slope adjacent to the house. The individual thereafter commenced arbitration proceedings against the insured, seeking compensation for flood-related damages. The insured sought coverage from its liability insurer in connection with the arbitration.

The insurer agreed to defend the insured in the arbitration, but reserved its right to deny any indemnity obligation. After an award was made in the arbitration proceeding, the insured sought coverage for the award under the insurer's policy. The insurer denied coverage and commenced a declaratory judgment action seeking confirmation of its coverage position. The court in the declaratory judgment action found that the insurer was obligated to indemnify the insured for the damage and loss of the individual's moveable property inside the house. However, the court found that the remainder of the claim was for damage caused by, or arising out of, the insured's work "product," which the court found was the entire residence, for which coverage was barred by the Damage to Your Product Exclusion.

Gonzalez v. Mid-Continent Cas. Co., 969 F. 3d 554 (5th Cir. 2020).

All Property Damage Arising from Defective Construction was Deemed to Occur During the Faulty Installation

The insured was a siding contractor retained by a homeowner to install new siding on his house. Three years after the completion of the insured's work, the house was damaged in a fire that was allegedly caused by the insured's negligence in hammering nails through the house's electrical wiring when he installed the siding. The insured was sued by the homeowner and thereafter sought coverage in connection with the suit from its liability insurer that had issued the policy in effect at the time the work was being performed. The liability insurer denied any obligation to defend or indemnify the insured in connection with the suit, resulting in this coverage action by the insured against its insurer.

Applying the allegations within the homeowner's lawsuit to the terms of the policy, the court held that the insured's allegedly negligent conduct in improperly hammering nails through electrical wiring while siding the homeowner's property constituted "property damage" caused by an "occurrence" necessary to trigger coverage under the policy. The court also held that property damage from the subsequent fire, which occurred after the policy expired, was deemed to have occurred when the policy was in effect. The court rationalized that because the definition of property damage states that "all such loss shall be deemed to occur at the time of the physical injury that caused it," and because the fire related back to the construction and/or installation of the siding, which occurred within the policy period, the fire was also deemed to have occurred when the electrical wires were originally damaged, entitling the insured to coverage.

The insurer also argued that, even if coverage were triggered, it would be barred by exclusions j(5) and (6), which barred coverage for the "particular part" upon which the insured performed his operations or work. The court, however, disagreed, stating that the insured was not hired to work on the electrical wiring that he negligently damaged and certainly did not perform work on every "particular part" of the property that was damaged by the fire.

Colony Ins. Co. v. First Mercury Ins. Co., No. H-18-3429, 2020 U.S. Dist. LEXIS 174510 (S.D. Tex. Sept. 22, 2020).

Damage to Property Outside Scope of Work is Covered

The insured was a general contractor for the construction of an apartment complex and was sued by the complex owner for damage caused by certain construction defects. The underlying suit was settled by several of the insured's liability insurers. One excess carrier who contributed a substantial sum toward the settlement sued another of the insured's excess carriers, seeking the latter's contribution toward the settlement pursuant to the principles of equitable subrogation.

Among the many issues in the coverage action was whether the defendant-insurer's policy covered any of the alleged damages in the underlying action, or whether they were, for example, barred by the policy's Damage to Property Exclusion. The defendant-insurer's policy applied to property damage that occurred during a specific one-year time period due to "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The court found that emails evidencing that the apartment complex was physically damaged by leaks from a window, the roof, etc., which required repairs to flooring and sheetrock within numerous units was sufficient to trigger coverage under the policy. The defendant-insurer thereafter argued that even if there was property damage within the policy period, the Damage to Property Exclusion limited coverage under the policy to a loss that occurred after the insured completed its work. Without disputing that assertion, the court found that there was a question of fact as to when the insured was performing operations at the time of the loss, mandating denial of the defendant-insurer's motion for summary judgment.

Siplast, Inc. v. Emplrs Mut. Cas. Co., No. 3:19-cv-1320-E, 2020 U.S. Dist. LEXIS 176539 (N.D. Tex. Sept. 25, 2020).

Suit Must Seek Damages Because of "Property Damage" for Coverage to be Triggered

The insured was a contractor hired by a property owner to install a roof system at the owner's premises. Several years after the roof system was installed, the property began to experience leaks, resulting in observed water damage within the premises. The owner alleged there were issues with the workmanship and materials comprising the insured's roof system. The owner sought to hold the insured liable for the cost of replacing its roof due to the insured's defective roof system and commenced suit. The insured tendered the owner's claim to its liability insurer, which subsequently denied coverage. The insured then commenced the instant coverage action against its insurer seeking a declaration that it was entitled to coverage in connection with the owner's lawsuit.

On its summary judgment motion, the insurer asserted that the insured was not being sued by the owner for damage to any property other than its own work and products that the owner sought to replace (i.e., the cost of a replacement roofing system), as opposed to any damage that resulted to the school from the defective roof. The court agreed, finding that although the underlying complaint mentioned damage to school property other than the insured's roofing products, the owner did not make a claim to recover from the insured for any such damage that was separate from the damage to the insured's product. The court therefore concluded that the Your Work Exclusion and Your Product Exclusion acted to bar coverage for the owner's suit.

Washington

The Phoenix Ins. Co. v. Diamond Plastics Corp., No. C19-1983-JCC, 2020 U.S. Dist. LEXIS 188222 (W.D. Wash. Oct. 9, 2020).

Definition of Occurrence

The insured was a pipe manufacturer and supplier that supplied pipe to a pipe installer in connection with a construction project. The pipe was alleged to have suddenly and physically failed as workers attempted to install it. Moreover, when the damaged pipe was being excavated, it allegedly caused other property on site to sustain physical damage and certain portions of the site could not be used for construction. The pipe installer filed suit against the insured. The insured tendered the lawsuit to its liability insurer, which filed this declaratory judgment action seeking a declaration it had not duty to defend or indemnify the insured. The insured moved for partial summary judgment.

First, the insurer argued that the insured's alleged delivery of defective pipe did not constitute an "accident" or "occurrence" under the policy. However, the court sided with the insured and authority holding that the unintentional faulty manufacture of a product does constitute an accident and occurrence for the purposes of the policy. Second, the court rejected the insurer's argument that "rip and tear" damage to other contractors' work during the removal of the defective pipe did not constitute "property damage" under the policy. Lastly, the court rejected the insurer's assertions that several exclusions such as the Your Product Exclusion, Your Work Exclusion, Impaired Property Exclusion, and Product Recall Exclusion applied, primarily because the underlying lawsuit alleged damage to other property besides the pipe itself. Thus, the

court granted the insured's motion for partial summary judgment ruling the insurer had a duty to defend.

Travelers Prop. Cas. Co. of Am. v. N. Am. Terrazzo Inc., No. C19-1175 MJP, 2020 U.S. Dist. LEXIS 212797 (W.D. Wash. Nov. 13, 2020).

Bad Faith Claim Investigation and Coverage by Estoppel

The insured, a flooring subcontractor, was hired to install epoxy flooring on two floors of a restaurant. The insured performed application of epoxy coating to the existing concrete flooring. The restaurant opened, but noticed damage and problems with the flooring over the next several months. The general contractor sent the insured subcontractor a notice of unsatisfactory performance. Shortly thereafter, the epoxy manufacturer sent the subcontractor a letter with a laboratory analysis identifying five different potential causes of the damage, three of which were attributable to the insured. The insured reported the potential claim to its CGL insurer advising that the claimed damages included replacement of materials and labor to remove and install new flooring, removal and replacement of kitchen, HVAC, and loss of business. The insurer appointed defense counsel to represent the insured within two weeks of its receipt of notice as a courtesy and subject to a reservation of rights though it neither accepted nor denied the insured's tendered claim. Afterward, the insured subcontractor agreed to replace the flooring. The insurer was aware of this, as well as the timing of the planned replacement. The insurer sent a representative to take photographs and perform a site inspection, but the representative did not take any flooring samples or perform further investigation.

Although the insurer reported that investigation into the damage was needed as it appeared a significant portion of the claim was uncovered, the insurer did not further inspect the flooring, retain an expert consultant, take samples, or perform a forensic investigation of the cause of the failure. However, the insurer subsequently retained an expert who was unable to take a flooring sample or perform any forensic lab analysis and therefore, in his own opinion, was unable to determine the probable cause of the failure. Several months later, the general contractor provided the insured with a draft complaint and the basis for its claims and damages. The underlying parties agreed to mediate but before they did, the insurer filed this declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the insured. The underlying parties proceeded with multiple mediations and ultimately settled the claims in the six-figure range.

In the declaratory judgment action, the insurer moved for summary judgment and relied on conclusory expert testimony from the same expert that opined he needed a laboratory analysis to determine the probable cause of the failure. The insured cross-moved on its claims of bad faith and coverage by estoppel. In its decision, the court held that the undisputed facts demonstrated that the insurer failed to undertake a timely and thorough investigation of the claim and then commenced this coverage action being unable to proffer sufficient evidence to show that the underlying incident and claimed damages resulted from the insured's work or product. The court found that the insurer's adjuster failed to investigate the damaged flooring before it was replaced, failed to obtain a sample, failed to timely hire a flooring expert, and therefore failed to investigate the applicability of the Your Work Exclusion and Your Product Exclusion, which it had long believed might limit or preclude coverage. The insurer's failure to perform a laboratory analysis to determine the probable cause of the failure, which according to its own expert was necessary, meant it could not with reasonable certainty demonstrate that the exclusions applied to bar coverage. Thus, according to the court, the insurer engaged in bad faith when it failed to timely and thoroughly investigate the incident and the applicability of exclusions and then knowing its own expert could not prove its claims of no coverage, commenced a coverage action against its insured. ■

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11600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
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