FirstLook

Issues and Developments in Insurance Law

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Letter from the Insurance Company Team

Coverage For Destruction But Not Construction?

In order to remedy defective construction, you frequently need to damage or destroy non-defective work. These damages are referred to as "rip and tear" or "get to" damages, and cases analyzing these damages are as varied as the work that was originally conducted.

Are "rip and tear" damages an "occurrence" of "property damage" under a CGL policy? Are "get to" damages subject to exclusions such as "your work" , "your product" or "impaired property" ? These are issues commonly seen in "rip and tear" coverage analysis.

Perhaps commentators in "In-House Defense Quarterly" said it best, "[t]he concepts of 'get to,' 'tear out,' or 'rip and tear' costs have created a quandary of misunderstandings in the construction defect coverage context." The articles in this issue show the different ways courts have analyzed "rip and tear" damages and the different results that those courts have reached. For those facing "get to" claims, this issue will highlight CGL policy terms and exclusions that are routinely used in "rip and tear" damage coverage analysis.

IN THIS ISSUE

"Getting To" the Root of the Problem: Insurance Coverage for "Get-To" or "Rip-and-Tear" Damages

By Meredith J. Risati

A common issue that arises in construction insurance litigation is whether there is coverage under a CGL policy for "get-to" or "rip-and-tear" expenses incurred when a contractor or subcontractor must remove, repair, and/or replace non-defective work in order to repair an otherwise inaccessible construction defect. When faced with this question, courts have generally followed a three step process in determining whether coverage exists: (1) Was there "property damage" within the scope of coverage of the CGL policy? (2) Was the "property damage" caused by an "occurrence," i.e. an "accident," sufficient to bring it within the scope of coverage of the CGL policy? and (3) Does an exclusion[1] apply to bar coverage under the CGL policy?[2] Operating within this three step framework, courts are split on their determination as to whether these damages are covered within the scope of a CGL policy, and there does not appear to be a majority rule. However, the cases demonstrate that a court is more likely to find coverage for rip and tear costs in the following circumstances: (1) the underlying "property damage" is covered by the terms of the CGL policy or (2) the rip and tear damages are caused by a covered "occurrence" under the terms of the CGL policy or are themselves an "occurrence."

Are Rip and Tear Damages "Property Damage"?

In determining whether there is coverage for rip and tear damages, some courts have based their analysis on whether the insured's underlying defective work is covered "property damage" under the terms of the CGL policy. In these types of cases, courts have generally held when the insured's underlying defective work is covered "property damage" under the terms of the policy, the rip and tear costs are also covered property damage. The majority view under the "property damage" analysis is that "the costs to rip out otherwise non-defective work in order to repair otherwise non-covered defective work is not 'property damage,' but the costs to rip out non-defective work in order to repair covered 'property damage' is considered 'property damage' and is covered. The rationale of many of these decisions is that the nature of the repairs cannot create coverage if none exists."[3] In other words, the analysis depends on whether the defective work is covered.[4] Under this analysis, if there is no coverage for repairing the insured's underlying defective work, there will be no coverage for "rip and tear" damages associated with repairing the insured's underlying defective work.[5]

For example, in *Palm Beach Grading, Inc. v. Nautilus Insurance Co.*,[6] the Eleventh Circuit Court of Appeals held that the rip and tear costs associated with repairing and replacing a defective pipe, which did not cause any damage that would not otherwise have been caused by tearing out the pipe, was not a covered claim for "property damage" under the general contractor's CGL policy.

Similarly, in *Golden Eagle Insurance Co. v. Travelers Companies*,[7] the Ninth Circuit held that there was no coverage for rip and tear costs when the insured's underlying defective work was not covered property damage under the terms of the insured's CGL policy. In *Golden Eagle*, the Ninth Circuit held that because the repair of the insured's defective concrete floors was excluded from coverage under the terms of the CGL policy, the rip and tear damages, which included the cost of the necessary removal of the non-defective, undamaged floor coverings in order to repair the concrete floors, were also not "property damage" because these rip and tear repairs "cannot create coverage where none exists."[8]

However, in *Clear, LLC v. American and Foreign Insurance Co.*,[9] the U.S. District Court of Alaska held that rip and tear costs were covered under an insured's policy because "making repairs to covered property damage necessarily includes the costs involved in removing and replacing other materials to gain access to the damaged property[.]" In cases such as *Clear*, the analysis is based on the existence of some covered "property damage" from which more damage in the form of corrective repair activities flow. [10] Therefore, "the recovery is not limited merely to the 'property damage' itself, but extends to the damages flowing from such damage."[11]

Do Rip and Tear Damages Constitute an "Occurrence"?

Other courts have analyzed "rip and tear" cases by determining whether there was a covered "occurrence" within the terms of the insured's CGL policy. For example, in *Colorado Pool Systems, Inc. v. Scottsdale Insurance Co.*,[12] the court held that a pool builder's CGL policy covered rip and tear damages to third party work necessitated by the demolition and replacement of a defective pool it had installed. The court held that while the demolition and replacement of the defective pool was not covered by the pool builder's CGL policy, the rip and tear damage to the non-defective third party work, including the damage done to a deck, sidewalk, retaining wall, and electrical conduits, was covered because it found that this damage was the result of an

"accident."[13] The court based its decision on a Tenth Circuit Court of Appeals opinion which held that "injuries flowing from improper or faulty workmanship constitute an 'occurrence' so long as the resulting damage is to nondefective property, and is caused without expectation or foresight."[14] Therefore, because the rip and tear damages in this case were to non-defective property, were not foreseeable, and were an injury resulting from the insured's faulty workmanship, the court held that the rip and tear damages were an "occurrence" within the terms of the CGL policy.[15]

In contrast, a Fourth Circuit case applying Maryland law, the court held that rip and tear costs were not covered by the subcontractor's CGL policy because there was no "occurrence" as "the so-called damage was not accidental."[16] In *OneBeacon Insurance Co. v. Metro Ready-Mix, Inc.*,[17] the court held that there was no occurrence when an insured subcontractor supplied defective grout to a construction project.[18] The grout ultimately had to be removed because it was too weak, which necessitated the removal of the non-defective, and otherwise undamaged, pile caps and columns that had been installed by a third party on top of the grout.[19] The court held that rip out and replacement of the third party's work was not covered because it was foreseeable that the insured would not only have to pay for any defects in its property, but also any incidental costs that are incurred in remedying those defects.[20]

In reaching this conclusion, the Fourth Circuit relied on *Woodfin Equities Corp. v. Harford Mutual Insurance Corp.*[21] In *Woodfin*, the Maryland Court of Special Appeals held that damages that resulted from repairing and removing defective HVAC units in a hotel, including costs associated with tearing out undamaged, non-defective walls, molding, and carpeting, were not caused by an "occurrence" and therefore, were not within the scope of coverage of the HVAC company's CGL policy. The court held that there was no coverage for the defective HVAC units under the policy because the property damage was confined to the insured's own work product.[22] Therefore, because the property damage to the HVAC units was not an occurrence, the damages resulting from the property damage to the HVAC systems were also not a covered occurrence.[23]

In *Nas Surety Group v. Precision Wood Products, Inc.*,[24] the Middle District of North Carolina held that there was no "occurrence" giving rise to "property damage" under an insured subcontractor's CGL policy for cost of repair and replacement of defective cabinetry and millwork, including the costs to repair non-defective drywall, repair walls, and reinstall sinks, wiring, and plumbing as a result of defective workmanship, as these are all foreseeable consequences of repairing and replacing the defective work. Because of this foreseeability, the rip out costs did not constitute an "occurrence" subject to coverage under the terms of the CGL policy.[25]

Similarly, an Arizona state court in *Desert Mountain Properties Ltd. Partnership v. Liberty Mutual Fire Insurance Co.*[26] also considered whether the cost of "getting to" damages incurred by a property developer as a result of repairing poorly compacted soil that homes had been built upon were covered by a CGL policy. In order to repair the defective poorly compacted soil, the property developer had to damage or destroy non-defective property, including walls, floors, slabs, or other portions of the homes that had not been affected by the poorly compacted soil.[27] The court recognized that while "damage to other property caused by or resulting from the defect" may be a covered "occurrence" within meaning of the CGL policy, "the cost of repairing a defect is not recoverable under a CGL policy in Arizona."[28] Therefore, because the removal or destruction of this non-defective work was not damage caused by the poorly compacted soil, but rather damage caused by the repair of the poorly compacted soil, the court held that the "get-to" damages were not a covered "occurrence" under the CGL policies at issue.[29]

In the recent case of *Big-D Construction Corp. v. Take it for Granite Too*,[30] the U.S. District Court for the District of Nevada considered whether the removal of stucco substrate from the exterior of a building was "property damage" caused by an "occurrence" after stone tiles that were adhered to it began falling off the building to the ground. The court held that because the stone tiles falling constituted "occurrences," the reasoning applied by other courts in cases such as *OneBeacon*, *Nas Surety*, and *Desert Mountain*, as described above, did not apply. The courts in those cases either found no occurrence or that damage resulting from repairing defective work is not covered.[31] In *Big-D*, the court found that there was "property damage" resulting from: (1) the stone tiles falling and hitting the ground, which constituted an "occurrence," and (2) the safety measures taken to prevent future property damage or future bodily injury, including the removal of tiles and stucco.[32] Therefore, the insurer's argument that the "rip and tear" damages of removing the stucco were not covered by the CGL policy failed because the stone tiles had to be removed from the stucco to prevent property or bodily damage.[33]

Do Any Patterns Emerge from These Cases?

As these cases demonstrate, there is no obvious majority rule regarding coverage for rip and tear damages associated with the removal and replacement of non-defective, and otherwise undamaged, work to access and repair underlying defective work. While the analysis varies, the cases do demonstrate several patterns. First, if the underlying defective work is covered "property damage" under the terms of the CGL policy, the rip and tear damages will more likely be covered under the terms

of the CGL policy. Second, if the rip and tear costs are caused by a covered "occurrence," or are a covered occurrence in and of themselves, there will more likely be coverage under the terms of the CGL policy. If these insuring requirements are met, various exclusions are then examined. Therefore, caution is urged to those determining whether coverage exists for claims involving rip and tear damages because of the different reasoning employed by courts on this subject.

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[1] The exclusions considered by courts when determining whether coverage is barred for rip and tear damages will be discussed in the next article: *"Rip-Out" Claims & Exclusions for "Your Work," "Your Product," and "Impaired Property"* by Eric Hulett.

[2] *Woodfin Equities Corp. v. Harford Mut. Ins. Co.*, 110 Md. Ct. Sp. App. 616, 648-50, 678 A.2d 116, 131-32 (1996), aff'd. in part, rev'd in part on other grounds, 334 Md. 399, 687 A.2d 652 (1997); *see also Dewitt Const. Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1133 (9th Cir. 2002).

[3] Lee H. Shidlofsky, Deconstructing CGL Insurance Coverage Issues in Construction Cases, J. AM. C. CONSTRUCTION LAW., August 2015.

[4] SCOTT TURNER, "Because of . . ."— Coverage of Consequential Damages, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES § 6:22, n.31 (Nov. 2016 update).

[5] *Id.*

[6] 434 Fed. Appx. 829, 831 (11th Cir. 2011).

[7] 103 F.3d 750, 757 (9th Cir. 1996), overruled on other grounds by *Gov. Employees v. Dizol*, 133 F.3d 1220 (9th Cir. 1998).

[8] *Id.*

[9] 2008 WL 818978, at *7 (D. Alaska Mar. 24, 2008).

[10] PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., Coverage for Rip and Tear Damages to Non-Defective Work, BRUNER & O'CONNOR ON CONSTRUCTION LAW § 11:239 (Dec. 2016 update).

[11] *Id.*

[12] 317 P.3d 1262 (Colo. Ct. App. 2012).

[13] *Id.* at 1271.

[14] *Id.* (quoting *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272, 1284 (10th Cir. 2011)).

[15] *Id.*

[16] *OneBeacon Insurance Co. v. Metro Ready-Mix, Inc.*, 242 Fed. Appx. 936, at *3 (4th Cir. 2007), (citing *French v. Assurance Co. of Am.*, 448 F.3d 693, 700 (4th Cir. 2006)).

[17] 242 Fed. Appx. 936 (4th Cir. 2007).

[18] *Id.* at *3-4.

[19] *Id.* at *4.

[20] *Id.* at *4

[21] 110 Md. Ct. Spec. App. 616, 648-49, 678 A.2d 116, 131 (1996), aff'd. in part, rev'd in part on other grounds, 334 Md. 399, 687 A.2d 652 (1997).

[22] *Id.*

[23] 110 Md. App. at 649.

[24] 271 F. Supp. 2d 776, 783 (M.D.N.C. 2003).

[25] *Id.*

[26] 225 Ariz. 194, 236 P.3d 421 (Ariz. Ct. App. 2010).

[27] *Id.* at 214, 236 P.3d at 441.

[28] *Id.*

[29] *Id.*

[30] 917 F. Supp. 2d 1096, 1109-10 (D. Nev. 2013).

[31] *Id.* at 1109.

[32] *Id.*

[33] *Id.* at 1110.

"Rip-Out" Claims & Exclusions for "Your Work," "Your Product," and "Impaired Property"

By: Eric J. Hulett

Portions of construction that must be ripped-out or torn-out in order to get to the defective work that needs to be repaired or replaced have been alleged by insureds to be covered damages and, therefore, are subject to coverage analysis. In addition to the "occurrence" analysis and the "property damage" analysis, which will not be discussed in this article, the standard CGL policy contains "your work," "your product," and "impaired property" exclusions that have been raised by insurers in response to rip-out claims. Although there is chaos in the case law on construction defect coverage decisions, when the claim is for costs to repair non-defective work, particularly work installed by someone other than the insured, many courts favor finding coverage, even in the face of these exclusions. The cases discussed below are provided to the reader for both guidance and caution in this area; it should also be remembered that we have seen the case law change in recent years from jurisdiction to jurisdiction.

Are Rip and Tear Expenses Subject to "Your Work" or "Your Product" Exclusion"?

In *Employers Mut. Cas. Co. v. Grayson*, 2008 WL 2278593 (W.D. Okla. 2008), the court analyzed whether the "your product" exclusion prevented coverage for replacement costs to remove non-defective bridge decking to repair defective concrete work. The court held that the "your product" exclusion applied only to the defective concrete work but not to the non-defective rip-out work.

Similarly, in *Harleysville Worcester Ins. Co. v. Paramount Concrete, Inc.*, 10 F.Supp.3d 252 (D. Conn. 2014), the "your product" exclusion prevented coverage for the insured-supplier of "shotcrete," a concrete product used to build swimming pools, where the defective concrete caused cracking and required the pool to be ripped-out and replaced. The court clarified that "the shotcrete itself [was the product] and not the larger pool into which it was incorporated." *Id.* at 266 (see cases cited).

In *Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667 (Mo. App. 2007), although, the court found the "your product" exclusion prevented coverage for the cost to repair the defective foundation, neither the "your work" nor the "your product" exclusion was held to preclude coverage for the costs to rip-out non-defective sub-flooring and framing in order to repair defective concrete poured for the foundation of a home under construction.

Likewise, in *Int'l Environmental Corp. v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa.*, 843 F.Supp. 1218, 1229 (E.D. Ill. 1993), the court, in a very brief analysis, held: "To be sure, EMI has sued IEC for damages which include injury to the fan coil units (IEC's own product). However, the third party complaint also alleged damages to other property. As noted above, in order to repair the faulty pipes, Waveland claims that it will need to break open walls." Thus, the court did not enforce the "your product" exclusion.

In *Limbach Co. LLC v. American Ins. Co.*, 396 F.3d 358 (4thCir. 2005), applying Pennsylvania law, the Fourth Circuit ruled against the insurance company holding that the "your work" exclusion did not preclude coverage for repairing/reinstalling backfill which was damaged as a result of the defective underground steam line because that work was performed by the insured's subcontractor thus triggering the subcontractor exception to the exclusion. Likewise, the costs of repairing and replacing the landscaping and concrete damaged in order to get to the defective steam line were not precluded by the "your work" exclusion because the damaged material was a third-party's work not the insured's work.

Similarly, in *Fed. Ins. Co. v. Firemen's Ins. Co.*, "the damage to Hammerash's [homeowner] property also included damage to property other than the home, and therefore, the 'your work' exclusion does not bar coverage for damages to the trees, azaleas, driveway, lumber, and furnishings that were damaged." *Fed. Ins. Co. v. Firemen's Ins. Co. of Washington, D.C.*, 769 F. Supp. 2d 865, 879 (D. Md. 2011).

However, in *Bright Wood Corp. v. Bankers Standard Ins. Co.*, 665 N.W.2d 544 (Minn. App. 2003), the court enforced the "your product" exclusion so that there was no coverage for the defectively manufactured windows and also no coverage for damage to other property in order to repair the windows. "This exclusion has also been interpreted to deny coverage for the cost of repairs necessitated by the defective product, including anticipated future repair costs. *Futura Coatings*, 993 F.Supp. at 1264. In *Carpole's*, the district court concluded that coverage was barred not only for the defective containers, but also

for the costs of cleaning up the ensuing leakage of liquid fertilizer. Id., 544 F.Supp. at 7-8; see also *Jacob v. Russo Builders*, 224 Wis.2d 436, 592 N.W.2d 271, 277 (App.1999) (interpreting similar policy language to exclude coverage for defective masonry in home construction and concluding that damages to interior, driveway, sidewalk, patio, and landscaping that incurred during repair of masonry were also not covered). The damage here is based solely on Bright Wood's defective product. The incidental damage to the finish, hardware, and weather-stripping was incurred only in order to make repairs. No evidence was introduced of damage to any product other than Bright Wood's components, except insofar as the non-Bright Wood components incurred damage during the repair process." *Id.* at 548-549.

Are Rip and Tear Expenses Subject to Impaired Property Exclusion?

In *Clear, LLC v. American Foreign Ins. Co.*, 2008 WL 818978 (D. Alaska 2008), CGL coverage for damage to non-defective property that was required to be removed and replaced in order to repair the insured's defective work, so-called rip-and-tear damages, was considered. Among other questions, the court evaluated the "impaired property" exclusion from the standpoint of the "loss of use" exception to that exclusion. The "impaired property" exclusion in the standard CGL policy allows coverage for the loss of use of the property resulting from sudden or accidental physical injury to excluded work. The court concluded that when the uninjured property was repaired the owner lost the use of that uninjured property and, in order for the owner of the property to get back the loss of use of the uninjured property, that uninjured property had to be replaced. Therefore, the court held that the policy covers the insured for damages incurred as a result of removing and replacing the non-defective property if necessary to repair the defective work.

In *Dewitt Construction Co. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127 (9th Cir. 2002), the insured-subcontractor improperly placed concrete piles as part of the building foundation which required that they be removed and reinstalled. However, the grout installed by another subcontractor into those piles necessarily had to be removed and replaced. The court found that the non-defective work removed, the so-called rip-out damage, was "property damage" caused by an "occurrence" which results in coverage.

Removal and replacement of nondefective bridge decking in order to replace defective concrete work was not subject to the impaired property exclusion because the bridge was not impaired property according to *Employers Mut. Cas. Co. v. Grayson*, 2008 WKL 2278593 (W.D. Okla. 2008). That is to say, the bridge could not be repaired by replacing only the defective concrete. Similarly, where "there is a potential for damage to property surrounding the HVAC installation due to removing sub-flooring to reach the ducts in order to rectify the situation" the court in *North Star Mut. Ins. Co. v. Rose* held that the impaired property exclusion did not apply. 27 F.Supp.3d 1250 (E.D. Okla. 2014).

However, in *H.E. Davis & Sons, Inc. v. North Pacific Ins. Co.*, 248 F.Supp.2d 1079, 1086 (D. Utah 2002), the court granted summary judgment in favor of the insurance company holding that the impaired property exclusion precluded coverage for the costs to remove and replace concrete footings installed by the general contractor necessitated by the repair work required to remedy the insured-subcontractor's defective soil compaction.

Continued Confusion Among Courts

Few areas of insurance coverage have produced greater confusion in the courts than coverage questions involving defective construction work. A sampling of comments from various courts shows recognition of this chaos:

> **"[T]here is no consensus among federal and state courts as to . . . whether . . . property damage arising from poor workmanship is an 'occurrence' under the standard CGL definition. . . significant debate and litigation across the United States." G*reystone Construction, Inc. v. National Fire & Marine Ins. Co.*, 661 F.3d 1272, 1281-82 (Cir. 10th 2011).**
>
> **There are "two opposing views . . . [and] law review articles that advocate both sides of the issue." *U.S. Fire Ins. Co.. v. JSUB, Inc.*, 979 So.2d 871, 886 (Fla. 2007).**
>
> **"No consensus among lawyers or courts as to what is intended to be covered by CGL policies exists." *L-J, Inc. v. Bituminous Fire & Marine Insurance Co.: In determining***

> ***coverage under Commercial General Liability policies, should policy language or public policy control?*** **56 S.C.L.Rev. 791, 797 (Summer 2005).**
>
> **"We have found numerous cases and articles showing there is also a conflict nationwide on this issue. [citations omitted]"** ***Lennar v. Great Am. Ins. Co.*****, 200 S.W.3d 651 (Tex. App. 2006).**
>
> **"Jurisdictions are split as to the ultimate effect of the subcontractor exception."** ***Couch on Insurance*****, §129:18.**

Projects involving concrete placement show the confusion and differing approaches by the courts to the same or similar defective work claims under the same or similar standard CGL policies. For example:

> **No Coverage: Rip-Out of Concrete Footings. In** ***H.E. Davis & Sons, Inc. v. North Pacific Ins. Co.*****, 248 F.Supp.2d 1079 (D. Utah 2002), applying Utah law, the court held that concrete footings poured by another subcontractor which were removed to repair the insured-subcontractor's defective soil compaction were not "property damage" because the concrete footings themselves were not physically damaged.**
>
> **Coverage: Rip-Out of Concrete Grout.** ***Dewitt Construction Co. v. Charter Oak Fire Ins. Co.*****, 307 F.3d 1127 (9th Cir. 2002), applying Washington law, replacement of non-defective grout in order to repair defectively installed concrete piles was covered.**
>
> **No Coverage: Rip-Out of Concrete Pilings. In** ***OneBeacon Ins. v. Metro Ready-Mix, Inc.*****, 427 F.Supp.2d 574 (D. Md. 2006), applying Maryland law, the court held that removal of non-defective concrete pilings in order to repair defective grout in the pilings was not "property damage" and thus not covered.**

In conclusion, as these cases involving concrete work demonstrate, the case law concerning "rip-out" damages reflects the larger chaos in construction defect coverage case law in general. Some caution is urged in evaluating the "your work," "your product," and "impaired property" exclusions in cases involving rip-out damages, as the cases discussed above may reveal a tendency of the courts to take a more insured-friendly position towards these exclusions for rip-out damages than for the underlying construction defect claim.

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