Coverage for "Rip and Tear" Costs: A Case Law Survey

The article was originally published by the American Bar Association in March 2013.

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You say "covered consequential loss", I say "non-covered inflicted injury": The developing law of coverage for "rip and tear" damages in construction defect litigation.

I. Introduction

The pace and frequency of litigation over allegedly defective construction continues unabated, and by all indications keeps rising. Typically, coverage does not exist under standard form general liability policies for costs to repair defective work or a defective product itself. A frequent point of contention in construction defect litigation, however, is whether coverage exists for damages caused by the need to remove, or replace non-defective work to "get to" and repair defective work or products. These costs are generally referred to as "rip and tear" or "get to" damages, although there is no uniformity in the use of this terminology in the case law.

The financial consequences of errors in construction can be staggering. This is all the more so if the only means of repairing the defective work also requires the demolition of other, non-defective work. There may be no more extreme an example of this than the claim of MGM Resorts International that the as-yet completed Harmon Hotel located at the City Center development in Las Vegas must be razed and rebuilt due to alleged construction defects that make the structure vulnerable to collapse. If true (the claim is aggressively disputed), the potential loss is the estimated $279 million investment in the property. Whether insurance would be available to cover any of the claimed amounts under these circumstances is presumably as aggressively disputed, but the point is that "rip and tear" costs can be tremendous, and the question of coverage for such damages is an increasingly litigated issue.

This survey attempts to identify and briefly summarize the facts and holdings of cases in which courts were called upon to determine whether such "rip and tear" or "get to" damages are covered under general liability insurance policies. [1]

II. Cases Generally Finding Coverage for "Rip and Tear" Costs

In *Colorado Pool Sys. Inc. v. Scottsdale Ins. Co.*,[2] an insured subcontractor was hired by a general contractor to build a swimming pool at a local community center. Construction of the pool involved the pouring of concrete around a rebar frame to create a concrete shell. After the shell was poured, a building inspector concluded that some of the rebar was too close to the surface, and the general contractor demanded that the pool be replaced. The subcontractor consequently demolished and

replaced the pool, and in the process damaged the deck, a sidewalk, a retaining wall, and electrical conduits. Despite alleged representations by the subcontractor's insurer that the claim was covered, it denied coverage based upon the absence of an "accident" or "occurrence" under the CGL policy at issue.

The trial court entered summary judgment for the insurer, and the Colorado appellate court reversed, finding that a portion of the damage was covered. Relying on *Greystone Constr. Inc. v. Nat'l Fire & Marine Ins. Co.*,[3] the court found 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.'"[4] The court clarified that this rule applies whether the resulting damage is to the insured's work or to the work of a third party. The court consequently concluded that while the CGL policy did not cover the costs incurred in demolishing and replacing the defective pool itself, coverage was afforded for the "rip and tear" damage to the non-defective third-party work, which included the deck, sidewalk, retaining wall, and electrical conduits.

In *Dewitt Constr. Co. v. Charter Oak Fire Ins. Co.*,[5] an insured subcontractor (DeWitt) negligently installed cement piles in a building foundation which were unusable. As a result, Dewitt had to install new piles, which required the removal and reinstallation of work already completed by other subcontractors. In addition, heavy equipment used by Dewitt in replacing the piles damaged underground mechanical lines and a coverage claim was made for all claimed damage. Dewitt's insurer denied coverage for the losses. On appeal of the trial court's judgment in favor of the insurer, the Ninth Circuit applying Washington law held that the defective manufacture of the piles constituted an "occurrence" which gave rise to "property damages" under the policy. Coverage consequently existed for the repair and replacement of damage to other subcontractors' work and for the damage to the buried mechanical lines despite the lack of coverage for the cost of replacing the defective work itself.

A Texas Court of Appeal reached a similar conclusion in *Lennar Corp v. Great American Ins. Co.*, in a coverage claim by the general contractor on a construction project.[6] There, the contractor/insured built more than 400 homes using defective synthetic stucco, the application of which resulted in water being trapped in the substrate, causing damages in the form of wood rot, mold, and termite infestation. The contractor sought indemnification from its insurers for the costs of the stucco replacement and repair, and coverage was denied. After a lengthy discussion, the Court of Appeal concluded that because the damage was unintended and unexpected, the use of the defective stucco was an "occurrence" under the terms of the policy. The court held that although the costs to remove and replace the defective synthetic stucco by itself, without damage to other property (*i.e.*, as a pure preventative measure), was not covered, the costs incurred to repair the water damage (including the costs for rip and tear) were covered. The court explained:

> For example, on some homes, windows were broken, driveways were cracked, and landscaping was damaged to repair the water damage. We characterize these costs as "damages because of property damage." Further, in some cases, Lennar may have removed some [synthetic stucco] to access and repair underlying water damage or determine the areas of underlying damage. We characterize these costs to remove [synthetic stucco] solely to repair water damage as "damages because of property damage."[7]

In *Columbia Mut. Ins. Co. v. Epstein*,[8] the insured contractor poured a foundation using concrete that did not meet local building code requirements. To remove and repour the concrete, the company also had to remove and reconstruct the framing and subfloor. The contractor's insurer denied coverage for the cost of replacing the framing and subfloor and initiated a declaratory judgment action. The trial court entered a judgment in favor of the insured, and the Missouri Court of Appeals affirmed. The court concluded that there was an "occurrence" which caused "property damage" under the terms of the policy such that coverage was afforded for the rip and tear costs incurred in replacing the concrete.

In *Bundy Tubing Co. v. Royal Indem. Co.*,[9] the Sixth Circuit applied Michigan law to hold that the cost of removing and replacing a non-defective concrete floor in which defective tubing had been imbedded was covered under the insured's liability policy. The court held: "In our opinion, property was damaged by the installation of defective tubing in a radiant heating system which caused the system to fail and become useless."[10]

The same result was reached in *Moraine Materials Co., Inc. v. The Ohio Casualty Ins. Co.*[11] In *Moraine Materials*, defective concrete was incorporated into a retaining wall that otherwise contained correctly comprised concrete, with the result that the entire retaining wall—both the part that was correct and the part that was defective, had to be removed. The court held that because it was impossible to remove the defective concrete without disturbing the rest of the structure, the incorporation of the defective concrete into the wall constituted property damage for which there was coverage. The court explained: "Moraine is not seeking to recover for the defective concrete, but is seeking to recover the expenses of removing the wall, which became defective in its entirety by the incorporation therein of Moraine's defective cement."[12]

A Kansas federal court faced a difficult issue in *Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.*,[13] ultimately concluding that some of the cost of demolishing and rebuilding a defectively constructed school was covered under an umbrella policy, but not the entire sum. In *Fidelity*, the insured contractor negligently constructed a middle school in Kansas. The faulty workmanship resulted in cracked walls, mortar joints and lintels, among other defects. Instead of repairing the defects, the school determined that it would be more cost effective to completely demolish the school and rebuild. The school subsequently filed suit against the insured and its surety to recover the cost of rebuilding. Eventually the parties settled, and the insured assigned its rights to coverage under an umbrella policy to its surety. The surety then filed suit against the insurer, claiming it breached its duty to indemnify the insured for the loss.

Following a bench trial, the court held that the policy only covered the cost of repairing "property damage," i.e. the cracks and other defects. The court explained that even though the school may have made a wise business decision to rebuild, the defects could have been repaired without completely rebuilding. Consequently, only the hypothetical repair costs were covered under the policy. Basing its decision on the sparse evidence presented at trial, the court concluded the insurer was liable for $1,000,000 of the approximately $3,500,000 spent reconstructing the school. The court held that this was a "reasonable computation" of what the cost would have been had the school decided to repair the defects, rather the rebuild the entire school.

III. Cases Finding Coverage For "Rip and Tear" Costs and Finding Inapplicable The "Your Product" and "Impaired Property" Exclusions

In *Indian Harbor Ins. Co. v. Transform, LLC*,[14] Transform contracted with East AHM LLC and Hansell Mitzel LLC (AHM) to construct modular condominium units. AHM purchased and supplied all the materials Transform used to build the modules. Once the modules were constructed, AHM "knitted" them together into the existing structure. AHM also constructed the surrounding lobbies, stairs, elevator shafts, and other common areas. When the building was almost complete, AHM discovered that the modules Transform constructed were defective, causing systemic electrical, structural, and plumbing problems. As a result, AHM had to tear out and replace much of the existing structure, damaging its own work in the process. Transform's insurer denied coverage for the damages and filed a declaratory judgment action seeking a finding that coverage was absent. Relying on *Yakima Cement Products Co. v. Great Am. Ins. Co.*,[15] the court held that there was an "occurrence" given that third party property damage resulted from the defective workmanship. The court further determined that neither the "Your Product" nor the "Impaired Property" exclusions applied to prevent Transform from recovering the rip and tear costs incurred in remedying the defective work. The court held that AHM's construction of the lobbies, stairs, and other common areas was not part of Transform's product, and the damage to this third party work was consequently covered by the policy.

An Oklahoma federal court similarly concluded that rip and tear costs were not excluded by the "Your Product" or the "Impaired Property" exclusions in *Employers Mut. Cas. Co. v. Grayson*.[16] In *Grayson*, Ready Mix supplied concrete for the construction of a bridge in Oklahoma. The concrete did not harden properly, causing the rebar to loosen and the bridge to crack. In removing and replacing the concrete, the deck, rails and rebar all had to be repaired as well. Ready Mix sought coverage from its insurer for the damages, and coverage was denied. The insurer subsequently filed a declaratory judgment action seeking a determination of no coverage. Ready Mix conceded in the litigation that the cost of replacing the concrete itself was not covered, but sought coverage for the costs of repairing the damage to other, third party work. The Oklahoma federal court agreed. As in *Indian Harbor*,

the court concluded that neither the "Your Product" or "Impaired Property" exclusions applied. Addressing the "Impaired Property" exclusion, the court held that "merely replacing the concrete would not have made the bridge usable, other component property had to be replaced as well. Thus, the bridge was not 'impaired property' because it could not be restored to use by only replacing the defective concrete."[17]

The court reached a similar conclusion in *Clear, LLC v. American & Foreign Ins. Co.*,[18] but on a different basis. In *Clear*, the successor in interest to a general contractor which negligently constructed a roof sought indemnification for the costs of replacing the damage caused by the defective roof. The insurer denied coverage. The Alaska federal court found coverage on the basis of an exception to the "Impaired Property" exclusion providing coverage for the "loss of use of property that result[ed] from a sudden or accidental physical injury to work done by [the general contractor] or its subcontractors." The court reasoned that because the exception was ambiguous, it had to be interpreted broadly pursuant to the customary rules of insurance policy interpretation. Because the exception made the "Impaired Property" exclusion inapplicable, the court determined that the costs of removing and replacing the undamaged portions of the building were covered under the policy to the extent they were necessary to repair the water damage caused by the defective roof.

IV. Cases Generally Finding An Absence of Coverage For Rip and Tear Costs

In *Sapp v. State Farm Fire & Cas. Co.*,[19] the insurer sought a declaratory judgment that it owed no coverage to a building contractor for the negligent installation of hardwood flooring. The hardwood floor had to be replaced because it began "cupping" or "warping" a few weeks after it had been installed. The insured sought coverage for the costs of removing and replacing the hardwood flooring, and for the costs of restoring the home to the condition it was in prior to removing and replacing the floor. The insurer denied coverage, alleging that the "business risk" exclusions prohibited the insured from recovering under the terms of the policy. The Georgia Court of Appeals agreed, holding that the "business risk" exclusions were unambiguous and excluded coverage for defective workmanship causing damage only to the construction project itself. The court reasoned that "[a]ny damages to the house during the removal of the hardwood floor and the restoration of the house to the condition it was prior to [insured's] work were merely incidental to [the home owner's] claimed damages that [the insured] negligently performed the services for which [the home owner] contracted."[20]

A South Carolina federal court reached the same conclusion in *Builders Mut. Ins. Co. v. Lacey Constr. Co., Inc.*[21] There, the insured was alleged to have negligently constructed two retaining walls in the common area of a development in South Carolina. The retaining walls failed to adequately retain the soil behind the walls, causing cracks in the foundation. The insured sought coverage for the cost of correcting the defects, but its insurer denied coverage and initiated a declaratory judgment action. In granting the insurer's motion for summary judgment, the court held that not only was the insurer not "obligated to indemnify [the insured] for the costs of repairing and replacing the walls," but was also not obligated to indemnify the insured for "any incidental demolition or reconstruction necessitated by the repair," as such incidental repairs did not qualify as "property damage."

In *Gentry Machine Works Inc. v. Harleysville Mutual Insurance Co.*[22] a Georgia federal court determined that the "business risk" exclusions precluded coverage except to the extent that the insured's defective product caused damage to other property. There, the insured manufactured parts for boilers, including a part known as the "pedestal." The pedestal was welded to the top of the boiler and served as the main rear hinge for the rear boiler doors. After receiving numerous complaints from customers, the insured replaced the pedestals and repaired other damage associated with the failure of the pedestals. When the insured sought coverage for the cost of the repairs, the insurer denied coverage. Applying Georgia law, the court cited *Sapp* and held that the policy's business risk exclusions precluded coverage for almost all of the costs associated with the repair of the pedestals including property damage to the pedestals themselves, the cost of inspecting the potentially defective pedestals, and damages to the boiler or its parts directly caused by the repair of the pedestals, among other things. However, the court found that the business risk exclusions did not preclude coverage for property damage to the boilers caused by the pedestal failure but unrelated to the pedestal repair.

In *Desert Mountain Prop. Ltd. P'ship v. Liberty Mut. Fire Ins. Co.*,[23] plaintiff contracted for the construction of a number of homes in Arizona. Shortly after the homeowners moved in, the insured builder received complaints about cracks in the interior walls of the homes, outdoor patio slabs, and retaining walls. After an investigation, the insured determined that the soil beneath the homes had not been properly compacted prior to the construction. In order to rectify the problem, plaintiff had to remove and damage the flooring within many of the homes to "get to" and repair the soil. On a motion for summary judgment, the superior court concluded that the insured could not recover from its liability insurance carrier for either the cost of repairing the defective soil or the associated "get to" damages of cutting open concrete floors. The Arizona Court of Appeals affirmed, reasoning that the costs of removing and repairing the non-defective property necessary to repair the soil was damage caused by the repair of the soil, not damage caused by the poorly compacted soil itself. The court did find, however, that the insured could recover the cost of repairing the damages that resulted from the poorly compacted soil, such as cracks in the floors and walls of homes caused by the defectively compacted soil.

V. Cases Finding An Absence of Coverage For "Rip and Tear" Costs Based On The Absence Of An "Occurrence"

In *OneBeacon Insurance v. Metro Ready-Mix, Inc.*,[24] a concrete manufacturer provided defective grout for use on a construction project in Baltimore. The grout supplied had a strength significantly lower than that specified in the contract, requiring the general contractor to completely demolish the concrete pilings and install new pilings with the proper strength grout. After the concrete manufacturer was sued for breach of contract and warranty claims, its liability insurer filed a declaratory judgment action seeking to determine its obligations under the policy. The Maryland federal court granted the insurer's motion for summary judgment, holding that the cost of demolishing and reconstructing the concrete pilings was not covered by the policy because there was not an "occurrence." The court defined an occurrence as "an event that takes place without expectation or foresight." As such, the court held that there was no occurrence because the manufacturer "clearly" could have expected that pilings supported by defective grout would have to be demolished and replaced.

In *NAS Surety Grp. v. Precision Wood Prod., Inc.*,[25] the insured subcontractor provided defective cabinets and millwork in connection with the construction of a new medical center. In the process of replacing the defective cabinets with nondefective materials, the subcontractor damaged and was required to repair drywall, repaint the walls, and reinstall sinks, wiring and plumbing. The subcontractor's surety sued the subcontractor's general liability insurer seeking indemnification for the amount paid pursuant its performance bond. Both parties filed motions for summary judgment. In ruling on the motions, the North Carolina federal court held that none of the repair and replacement costs were covered under the policy. The court explained that the costs incurred in repairing the drywall, repainting the walls, and reinstalling the sinks, wiring and plumbing were not covered because they were foreseeable consequences of the replacement of defective work. Thus, there was not an accidental "occurrence" as required to trigger coverage under the policy.

In *Bright Wood Corp. v. Bankers Standard Ins. Co.*,[26] the insured manufacturer supplied wood window sashes that rotted due to a lack of preservatives. To remedy the defect, the entire window had to be replaced. After its general liability insurer denied coverage for the cost of the repairs, the manufacturer brought a declaratory judgment action. The district court entered summary judgment in favor of the insurer. On appeal, the Minnesota Court of Appeals affirmed, noting that all of the damages incurred were based solely on repairing the defective product. The court reasoned that, because the repairs were deliberately undertaken, the resulting damage was not accidental occurrence. Accordingly, there was no coverage under the terms of the policy.

Endnotes

1 This survey does not attempt to identify cases decided in the context of other insurance lines, which may exist for the benefit of contractors such as builder's risk insurance, permanent property insurance or professional liability insurance.

2 No. 10CA2638, 2012 WL 52 65981 (Col. Ct. App. October 25, 2012).

3 661 F.3d 1272 (10th Cir. 2011).

4 *Id.* at *6 (citing *Greystone*, at 1284).

5 307 F.3d 1127 (9th Cir. 2002).

6 200 S.W.3d 651 (Tex. App. 2006), *abrogated on other grounds by Gilbert Texas Constr., L.P. V. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010).

7 *Id.* at 678 n.33.

8 239 S.W.3d 667 (Mo. App. 2007).

9 298 F.2d 151 (6th Cir. 1962).

10 *Id.* at 153.

11 1979 WL 208510 (Ohio App. Dec. 12, 1979).

12 *Id.* at *4. Similar "incorporation" cases decided in product cases but outside the construction context exist but are outside the scope of this survey.

13 215 F. Supp.2d 1171 (D. Kan. 2002).

14 2010 WL 3584412 (W.D. Wash. 2010).

15 93 Wash.2d 210, 217 (1980).

16 2008 WL 2278593 (W.D. Okla. May 30, 2008)

17 *Id.* at *6.

18 2008 WL 818978 (D. Alaska March 24, 2008).

19 226 Ga. App. 200 (1997).

20 *Id.* at 205.

21 C.A. No. 3:11-cv-400-CMC, 2012 WL 1032539 (D.S.C. March 27, 2012).

22 621 F.Supp.2d 1288 (M.D. Ga. 2008).

23 236 P.3d 421 (Ariz. App. 2010).

24 427 F. Supp.2d 574 (D. Md. 2006).

25 271 F. Supp.2d 776 (M.D.N.C. 2003).

26 665 N.W.2d 544 (Minn. Ct. App. 2003).