

Insurance Law

Coverage Constraints: Understanding the Quirks of the “Your Work” Exclusion in Construction CGL Policies

By Kenneth Rubenstein and Gregory Silverman

Most contractors carry commercial general liability (CGL) insurance as a foundation of their risk management strategy. This insurance, however, is often misunderstood, with many contractors (and their attorneys) misunderstanding what risks and losses the coverage does – and does not – cover. CGL policies typically cover a contractor's liability for property damage and bodily injury caused by the contractor's work, but include various policy exclusions. One of the most important, but misunderstood provisions is the so-called “Your Work” exclusion.

The Your Work exclusion generally operates to exclude coverage for damage to the contractor's own work. If a contractor builds a wall and it falls on a stranger's car, that liability would be covered as property damage to others. Similarly, if the wall falls and injures a pedestrian, the insurer would cover that bodily injury to another. But if the wall falls and the only damage is to the wall itself, and no property damage or bodily injury befell another, the Your Work exclusion would likely apply.

The purpose of the Your Work exclusion. The New Hampshire Federal Court in *Fletcher's Sandblasting and Painting, Inc. v. Colony Insurance Co.*, No. 15-490, 2017 DNH 097 (2017), recently illuminated the reasons behind the existence of the Your Work exclusion. CGL policies are designed to insure against fortuitous, unanticipated events that give rise to “tort liability for physical injury to the person or property of others.” In other words, accidental property damage or personal injury, which may occasionally occur in the course of running a business, is covered.

But the “fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship.” CGL policies are not designed to cover business risk itself, which occurs as a consequence of the insured not per-

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forming well. This is a component of every business relationship that is “necessarily borne by the insured in order to satisfy its customers.” Otherwise, the incentive to perform work in a good and workmanlike manner would decrease. And guaranteeing a contractor's workmanlike performance is the purpose of a performance bond, not a CGL policy insuring against accidents causing property damage or personal injury. In other words, the policy does not cover re-performance of the contractor's defective work.

The contours of the Your Work exclusion. The NH Supreme Court clarified the Your Work exclusion to bar coverage *only* to the defectively constructed portions of a contractor's work – not damage to other non-defective work. In *Cogswell Farm Condominium Association v. Tower Group, Inc.*, 167 N.H. 245 (2015), a contractor's defective work (a leaky water barrier) caused water damage to several condo units that the contractor had properly constructed. The property owner sued the contractor and sought to recover under the contractor's CGL policy. The contractor's insurer, however, denied coverage based upon the policy's Your Work exclusion which read: “[t]hat particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it.”

The carrier argued that this clause precluded *any* claim for damage to the contractor's own work. The trial court agreed. But the NH Supreme Court overturned the decision, holding that while the insurer's interpretation was reasonable, the policy could also be read in a more limited fashion, only barring claims for the cost of

repairing the *defectively constructed portions of a contractor's work*. The court concluded that if a contractor's defective work causes damage to other non-defectively built portions of the project, the contractor cannot recover its costs for repairing the defectively performed work, but can claim coverage for the damage to the non-defective work.

The subcontractor exception. CGL policies also typically specify that the Your Work exclusion includes “work or operations performed by you or on your behalf.” The Your Work exclusion may contain the following subcontractor exception: “if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.” Accordingly, if the subcontractor builds an unsound foundation, or the material supplier provides a defective duct system that causes a fire, the subcontractor exception will apply.

Conclusion. Under the contractor's CGL policy's Your Work exclusion, any

damage to the structure resulting from alleged construction defects may not be covered. The CGL policy, however, will likely cover the risk of injury to people and damage to property other than the completed work itself (assuming no other exclusions apply). And as long as a third party, whether subcontractor or supplier, is responsible for the defect out of which the property damage claim arises, the subcontractor exception to the Your Work exclusion will be applied. Even simple construction defects can swell into flood of potential liability. A detailed assessment of the Your Work exclusion, including the important subcontractor exception, could have a significant impact on the extent of an insurer's coverage.

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