

# Defective Work and Triggering CGL Coverage<sup>1</sup>

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Most Commercial General Liability (CGL) insuring policies purchased by general contractors provide for coverage of inadvertent property damaged caused by the defective work of subcontractors hired by the general contractor. The triggering of this coverage is currently under attack by some insuring companies. These very important triggering issues are currently pending before the Texas Supreme Court, in *Lamar Homes, Inc. v. Mid-Continent Casualty Co.* 428 F.3d 193 (5<sup>th</sup> Cir. 2005), which agreed to answer these questions certified to it by the United States Court of Appeals for the Fifth Circuit which are summarized as follows:

1. Do allegations against a general contractor by an owner for damage to or loss of use of the building itself allege an "accident" or "occurrence" sufficient to trigger the duty to defend or indemnify under a CGL policy.

2. Do allegations against a general contractor by an owner for damage to or loss of use of the building itself allege "property damage" sufficient to trigger the duty to defend or indemnify under a CGL policy.

The fact scenario is fairly common, an owner discovers defects in construction of its building after construction is complete which has caused damage to the building and sues the general contractor. The defective work was performed for the general contractor by subcontractors. The general contractor seeks coverage under its CGL policy requesting its insuring company defend the lawsuit and indemnify it (i.e. pay any damages) in the event of settlement or adverse jury verdict. A declaratory judgment action between the general contractor and insuring company follows.

Most modern CGL policies take a three tier approach to coverage. First, the policies initially grant broad coverage for inadvertent property damage caused by an occurrence. Second, the policy then limits that broad coverage by the use of "exclusions", shifting the risk of loss for specific occurrences back to the insured. These are many times referred to as business risk exclusions. Finally, certain specific risks are then shifted back to, or preserved, for coverage by the insuring company by "exceptions". One of these business risks which is normally preserved and is covered by the CGL policy is when the damaged work or the work out of which the damage arises was performed on the general contractor's behalf by a subcontractor.

However, in most CGL policies, the policy must first be "triggered" before the issues of coverage actually arise. Normally a policy is triggered when property damage is caused by an occurrence. In other words, when there is physical injury to tangible property caused by an accident, the policy is triggered and coverage for the loss is determined by the exclusions, and exceptions to the exclusions, contained within the insuring policy.

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Unfortunately, what has become more common within the last several years is that the insuring company has refused to defend or indemnify the general contractor for inadvertent property damage caused by a subcontractor hired by a general contractor (a covered occurrence under the insuring policy) but instead asserts that the insuring policy was never "triggered" because there has been either 1) no occurrence (accident) or 2) there has been no property damage. The insuring company takes the position that while the language of the insurance policy may provide coverage, the policy itself is never triggered because there is no occurrence (accident) or there is no property damage. Stated more simply the issue of coverage never arises because the policy is never triggered.

The legal arguments of both the general contractor and insurer are fairly complex regarding whether defective work by a subcontractor hired by a general contractor is an "occurrence" causing "property damage". Both the Texas State Appellate Courts as well as the Federal Courts have split on these issues.

The determination of whether an occurrence exists revolves around whether the actor's conduct was an accident. Those rejecting the triggering of coverage have taken a narrow view of accident, while those courts finding that the insuring policy is triggered interpret accident broadly. Put more simply, those courts rejecting the triggering of coverage have literally determined that the construction of a building in and of itself is a deliberate volitional act and therefore cannot be an accident. Those courts reading accident more broadly look to whether the actor through its conduct, intended to cause harm to others and whether the harm was a reasonably foreseeable effect of the actor's intended conduct. That is, while the construction of the building was voluntary and intentional conduct, did the contractor intend on causing the property damage when he constructed the building and was it reasonably foreseeable that the work when performed would not cause damage to the building. An often cited example of what constitutes an accident is the hunter who intentionally fires a gun believing the target to be a deer, when in fact it is a person. The narrow view would interpret the firing of the gun as an intentional act and therefore not an accident, while the broader view would interpret the intent of the hunter in firing the gun; was the intent of the voluntary act of firing the gun to kill an animal, or a person. If it was to kill an animal and it was reasonably foreseeable that a person would not be killed, there was an accident and therefore an occurrence under the insuring policy.

The argument regarding property damages has also been addressed by Texas and Federal courts with some split of authority, however the majority of courts have rejected the insuring company's argument. The insuring company's argument regarding property damage is somewhat similar to the argument regarding occurrence, that is the definition of property damage should be read narrowly to exclude property not in the general contractor's possession as well as the work product of the insured. The general contractor argues the term should be read broadly to include damage to the property of others (the owner) or its work product (the building). The insurer's argument seems to ignore the simple definition of property damage in most CGL policies which requires only that there be physical injury to tangible personal property, not that there be physical injury to tangible personal property *of others, of third parties, or to work not performed by the insured or its subcontractors.*

The pragmatic approach taken by the general contractor is simple, i.e. one must presume that the objective of the insurance contract is to insure, and a court should not construe a policy of insurance to defeat that objective unless the language of the policy requires it. The insuring company's argument obviously ignores this objective and attempts a strained reading of the definitions of occurrence and property damage to avoid triggering of the policy and therefore avoiding having coverage determined from the policy language. Such an approach by the insuring companies lends itself to the argument that the coverage it is allegedly selling is illusory, nothing more than smoke and mirrors.

Be sure to keep in touch with your insuring agent and counsel regarding these very important insuring issues which will likely be determined in the near future.

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