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Additional Insured & Contractual Indemnity

The nuances that exist between insurance coverage for an additional insured and contractual indemnity are most commonly encountered in construction defect litigation.[1] There, the plaintiff typically sues its general contractor for alleged errors in construction which has caused the completed building to be damaged or less useful then intended. These claims sound in both breach of contract and negligence. In turn, the general contractor will usually deny the allegations while claiming that any damages that exist were caused by the actions or inactions of its subcontractors. These third-party claims will also sound in both negligence and contract.

Putting aside whether the general contractor or its subcontractors may be liable for alleged damages, insurers must determine whether some or all of these claims are covered under general liability policies issued to the general contractor and the subcontractors. Often, the general contractor has a direct right of coverage under the subcontractor's policy as a listed additional insured, or as a "blanket additional insured" by endorsement for work performed by the subcontractor. Even in the absence of such designations, the subcontractor's insurance carrier may be exposed to the claims of the general contractor as a result of an indemnification agreement contained in the subcontractor agreement. Determining whether the general contractor has a right to coverage as an additional insured or merely a claim for indemnification is critical as it determines whether or not the carrier and general contractor have direct rights and responsibilities to each other under the policy and what types of claims may be covered by the policy.

Georgia courts have expanded coverage under CGL policies by finding that construction defects may constitute an occurrence that caused property damage within the terms of CGL policies. But, the expansion of coverage by Georgia courts has not been unlimited. Indeed, the Supreme Court of Georgia has continually noted that CGL coverage generally is *not* intended to insure against liabilities "for the repair or correction of the faulty workmanship *of the insured*." Taylor Morrison Svcs. v. HDI–Gerling America Ins. Co., 293 Ga. 456, 460–461(1), 746 S.E.2d 587, 591 (2013). While construing the standard CGL insuring agreement, the usual and common meaning of accident, the definition of occurrence that flows therefrom, and the additional limitations imposed by the requirement of property damage, the Supreme Court held that subject to specific exclusions, a CGL policy *may* provide coverage when the defective work of the insured unexpectedly damages other, nondefective property or work. *Id.* at 461(1), 591. Similarly, the court in Builders Ins. v. Tenebaum, also recognized that unintentional damage to **other** property caused by the defective work of a builder is an accident caused by an occurrence and therefore covered by a commercial general liability policy. Builders Ins. v. Tenenbaum, 327 Ga. App. 204, 209, 757 S.E.2d 669, 674 (2014).

[1] This paper is written as a scholarly discussion of complex legal issues and is not intended to be advice applicable to any specific circumstance. Legal opinions may vary when based upon subtle factual differences. All rights reserved.

This of course begs the question, who is the *insured* under the policy issued to the subcontractor? The only way to answer the question is to examine both the policy of insurance issued to the subcontractor and the terms of the subcontractor agreement.

Turning to the terms of the CGL policy, to be covered, "property damage" must occur during the policy period and be caused by an "occurrence," which is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Property damage" is typically defined as follows:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.
> ...

Moreover, for "property damage" coverage under the Policy, a party must be an "insured". If the general contractor is listed specifically in the policy as an additional insured, then it is considered an insured subject to the policy's terms. Other methods are also employed to extend coverage to a broader range of additional insureds. For instance, consider the following endorsement which extends coverage based upon the provisions of the subcontractor agreement:

> **XII. Additional Insured by Contract, Agreement or Permit**
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> A. **Section II – WHO IS AN INSURED** is amended to include as an additional insured any person or organization for whom [the named insured is] performing operations when [the named insured] and such person or organization have agreed in writing in a contract or agreement, that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused in whole or in part, by:
>
> 1. [The named insured's] acts or omissions; or
> 2. The acts or omissions of those acting on [the named insured's] behalf;
>
> in the performance of [the named insured's] ongoing operations for the additional insured.
>
> A person's or organization's status as an additional insured under this endorsement ends when [the named insured's] operations for that additional insured are completed.

So rather than name a specific organization, the policy allows the subcontractor agreement to dictate who is considered an additional insured. Typical language in subcontractor agreements may provide as follows:

> § 6.3.1 To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless [Contractor], Owner, engineers and the Architect, and each of their agents, officers, directors, employees, representatives and partners from and against all claims, damages, losses, expenses (including, but not limited to attorney's fees), liabilities, interest, judgments which (i) are attributable to injury, sickness, disease or death or to injury or to destruction or damage to property including loss of use there from, and (ii) were caused by any default or negligent act or omission of the Subcontractor according to the contract documents.
>
> § 6.4.1 [Contractor] shall be added as an additional insured to the subcontractor's general liability policy including work in progress and completed operations.
>
> § 6.4.2 The additional insured status shall be on a primary and non-contributory basis.
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This typical agreement would allow the General Contractor to claim additional insured status under the subcontractors policy. It should be noted however, that the status of additional insured is not unlimited. As noted above, for our sample policy the organization named as additional insured is only entitled to the following limited coverage:

> B. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused in whole or in part, by:
>
> 3. [The named insured's] acts or omissions; or
> 4. The acts or omissions of those acting on [the named insured's] behalf;
>
> in the performance of [the named insured's] ongoing operations for the additional insured.

Absent direct coverage as an additional insured, the policy does have exposure to the general contractor based upon the indemnity agreement in the subcontractor agreement. Thus, the insured and the carrier could be liable for that limited contractual exposure in which damages arises out of the insured negligence in the performance of a contract. This is an exception to the general rule.

CGL policies do not generally provide coverage for mere breaches of contract. See Chatham Area Transit Auth. V. First Transit, Inc., CV406-282, 2009 WL 2135809 (S.D. Ga. July 15, 2009); Custom Planning & Dev., Inc. v. Am. Nat. Fire Ins. Co., 270 Ga. App. 8, 10, 606 S.E.2d 39, 41 (2004) ("occurrence does not mean a breach of contract . . . ."). Indeed, the Court of Appeals, in a construction defect coverage dispute noted: "CGL coverage is intended to cover the 'potentially limitless liability' associated with the risk that 'the work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the completed work itself, and for which the insured may be found liable.' For there to be coverage under a CGL policy for faulty workmanship, there would have to be damage to property other than the work itself and the insured's liability for such damage would have to arise from negligence, not breach of contract." McDonald Constr. Co. v. Bituminous Cas. Corp., 279 Ga. App. 757, 757, 632 S.E.2d 420, 421 (2006) (citing SawHorse, Inc. v. S. Guar. Ins. Co. of Ga., 269 Ga. App. 493, 495-96, 604 S.E.2d 541 (2004)). The McDonald court also held that "[t]he coverage applicable under the CGL policy is for tort liability for injury to persons and damage to other property and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." Id. at 423, 761. The distinction between tort liability and contract liability was also discussed in Custom Planning Development, Inc. There, the Court of Appeals held that there was no coverage under a CGL policy because there was no "accident" or "occurrence" under the policy, because there was no property damage as a result of negligence, instead there was a breach of contract and a breach of implied warranty. Custom Planning & Dev., Inc., 270 Ga. App. at 10, 606 S.E.2d at 41.

A policy which provides coverage for personal injury or property damage does not provide coverage for a claim based solely in contract. Scottsdale Ins. Co. v. Great American Assur. Co., 271 Ga. App. 695, 696, 610 S.E.2d 558, 560 (2005). This is true even if the genesis of the underlying dispute was a covered loss (such as a personal injury). Id. In Scottsdale, a vision practice was sued for malpractice. Id. In its lease agreement, the vision practice's landlord had agreed to indemnify it against certain losses. Id. A lawsuit was brought against the landlord's insurance carrier as a result of the landlord's breach of the indemnity agreement. Id. The Georgia Court of Appeals held, however, that there could be no recovery against the landlord's carrier because the nature of the claim against the landlord was solely a contract claim. Id.

Policies include exclusions that bar coverage for mere contractual exposure, but there is an exception to this rule (contained within the exclusion itself) that extends coverage for indemnification agreements. Consider the typical exclusion below:

The Policy excludes coverage for:

Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred in or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

As used in this provision, "**Insured contract**" means:

That part of any other contract or agreement pertaining to your business … under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Putting these together, it is clear that the policy could be exposed to the claim of the general contractor seeking damages for the insured's alleged negligence based upon the indemnity agreement contained in the subcontract. Nevertheless, the insured's exposure, and the carrier's, is limited to damages suffered by the general contractor because of the negligence of the insured.

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