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# Legal Viewpoint

**C**ontractors don't typically think of their comprehensive general liability insurance policies ("CGL Policies") as providing coverage for claims of damage to a project owner's property. Property damage claims by neighboring landowners or businesses or injury claims by persons on or near the job site are the types of claims that contractors usually think of as being covered by CGL Policies. Insurers want policyholder contractors to believe that insurance coverage for construction projects is limited to Builder's Risk coverage for damage to work under construction, and that, even then, such coverage is only for the results of natural disasters, such as typhoons, floods or earthquakes. The current economic climate, however, has spurred an increase in construction related court cases and these cases demonstrate that: (1) there can be recovery under Builder's Risk insurance policies for damage to a project caused by defective design or construction; and (2) there can also in certain circumstances be recovery under CGL Policies for damage to a project caused by defective construction or materials.

## **Coverage Under Builder's Risk Policies for "Ensuing Loss" Resulting from Defective Design or Workmanship**

In general, a contractor will not be able to recover under a Builder's Risk policy for defective design and workmanship that does not cause property damage to other non-defective work. The rationale for this is that correcting defectively designed or performed work, before it causes damage to other property or parts of the work, is part of the contractors' and designers' ordinary contractual responsibilities. Builder's Risk insurers often try to take this principle a step further and disclaim coverage even when damage to other property occurs as a result of defective design or performance of the contract work. Recent court decisions, however, make it clear that Builder's Risk policies provide substantial coverage for the costs which arise out of defective design or workmanship which results in property damage beyond the defective work. The reason for this is that, although most Builder's Risk policies contain exclusions for

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costs incurred in "making good" a design error or defective workmanship, the policies provide coverage when "direct physical loss or damage ... ensues." As the case described below illustrates, taking a "Builder's Risk" carrier's "No" for an answer can often leave substantial amounts of a contractor's money on the table. In a recent case in the Massachusetts Business Litigation Session, the contractor contended that it was entitled to coverage under a Builder's Risk insurance policy for the costs it incurred to repair and to recover from property damage it sustained as a result of a series of floods during the construction of the I-90 immersed tube tunnels that cross Boston's Fort Point Channel. The policy contained a typical exclusion for the "costs of making good" design errors or defective workmanship, but also contained exceptions to these exclusions for the "direct physical loss or damage" which "ensued" from such defective design or construction. Although the insurer had disclaimed coverage and claimed that the floods were caused by faulty design or construction, the court found, based upon the ensuing loss language, that the costs of repairing the physical loss or damage caused by the floods, as well as the unreimbursed costs incurred while the project was shut down, including costs related to extended field and home office overhead, debris removal and emergency repairs would be recoverable under the policy, even if a design or construction defect had caused the floods.

### **General Liability Coverage for Damage That Relates to a Subcontractor's Work or Damage Which Occurs After a Project is Completed**

Faulty Workmanship as an "Occurrence"  
General liability carriers often take the position that faulty workmanship by a contractor at any level cannot be an "occurrence" and cannot, therefore, result in a covered loss. Courts

have held otherwise, however, reasoning that a number of the standard CGL exclusions would be superfluous if the term "occurrence" did not include faulty workmanship. As one court has stated: liability insurance "does not cover the accident of faulty workmanship, but rather the faulty workmanship which causes an accident."  
**Coverage for Damage to a Project Caused by Faulty Work Performed by a Subcontractor**

CGL Policies typically exclude coverage for "property damage" to the insured's work. This exclusion does not apply, however, if the damaged work (or the work out of which the damage arises) was performed on the insured's behalf by a subcontractor.

Courts have found coverage for a subcontractor's or supplier's defective work, particularly where such defective work has been incorporated into a larger project. By way of example, courts have found that general contractors were entitled to coverage for leaking windows improperly installed by a subcontractor, for defective coping stones installed by a subcontractor in a municipal pool deck and for damage to a parking garage caused by a subcontractor's installation of a defective structural component.

### **Coverage for Damage Caused to Property After a Project is Complete**

CGL Policies typically exclude coverage for damage to a general contractor's work while a project is still underway. Notwithstanding insurers' protestations that damage to project work can never be covered under CGL policies, Massachusetts courts have held otherwise where damage to the project work occurred after the project was completed. This is because a number of the most significant CGL exclusions are directed at ongoing operations. As the Chief Justice of the Massachusetts Business Litigation Session recently noted, these exclusions for



“ongoing operations” “connote[] active work at the time the damage occurs.” Particularly where a contractor’s liability policy includes optional “Products-Completed Operations Hazard,” or “PCOH,” coverage, many courts have found that CGL policies can cover damage to construction projects which occurs after the insured’s work on the project is completed.

For example, in a famous case arising out of the construction of the John Hancock Tower in Boston, John Hancock sued Gilbane, the general contractor, and other parties associated with the design and construction of the tower’s curtain-wall, alleging that significant numbers of the glass curtain-wall panels had failed. Hancock asserted that the problem was the result of negligent design and construction and that Hancock had sustained substantial damages, including the deprivation of the use of the Tower, diminution in value of the Tower, and lost rental income. The Massachusetts Supreme Judicial Court held that, because Hancock’s claims could be read as claiming damages which occurred after integration of the defective curtain-wall into the Tower, the allegations were sufficient to trigger Gilbane’s insurer’s duty to defend Gilbane.

### **Coverage Under a Lower Tier Contractor’s Insurance Policy**

Another thing to keep in mind, when assessing available insurance coverage in the wake of a construction defect claim, is that additional insured coverage provided by endorsement to a lower-tiered contractor’s CGL policy can sometimes stand in the place of a contractor’s own insurance, as well as provide coverage for the contractor which is even more generous than the coverage provided for the party that purchased the policy. Since many construction contracts contain “additional insured” provisions, such coverage should always be investigated in the event of a construction related claim.

### **Insurers’ Liability For Attorney’s Fees**

When considering whether to pursue a CGL carrier which has disclaimed coverage for a construction related loss, contractors should be aware that it is well-settled in Massachusetts that, if a court determines that the insurer wrongly failed to provide an insured contractor with a defense to a claim, the contractor will be entitled to recover its reasonable attorney’s fees and costs incurred in establishing the insurer’s duty to defend the contractor. Awards of multiple damages and attorney’s fees are also available under Massachusetts law in cases of serious claim related misconduct by insurers.

### **Conclusion**

As you can see, insurance coverage is often available to a contractor faced with claims by an owner that arise either before or after project completion. Although there is no guarantee of coverage for an owner’s claims, insurance carriers’ denials of coverage are often not well founded. Before chalking up a claim as a “loss,” you should gather together your insurance policies and certificates and seek the advice of your insurance advisor and the advice of an attorney who specializes in insurance coverage issues. Having an experienced professional assess the situation and the available insurance materials will make certain that your company receives all of the protection to which it is legally entitled.