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Construction Industry Advisor

General Contractors and Construction Managers Can Get Insurance Coverage for Construction Defect Claims



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EDITOR'S NOTE: This article is the second in a series about insurance coverage for construction projects. Each short article addresses a common situation where an insurance company stated grounds for denial or limitation of coverage in an improper, overbroad, or misleading way. In such situations, policyholders should know their rights to coverage and assert them aggressively. Insurance coverage, when available, can be essential and necessary for a business to close out lingering liabilities.

Key points:

GCs and CMs should avoid directly performing construction work, limiting their activities to oversight, management, and general conditions;

Claims due to occurrences damaging the property of others are not subject to the "your work" exclusion in a CGL policy;

Construction defect claims for completed work are eligible for coverage up to the amount of the Products/Completed Operations Aggregate shown in the policy's Declarations.

Myth: Construction Defect Claims are Excluded Because Damage to "Your Work" is Excluded from Coverage

A common myth in the world of construction insurance is that General Contractors ("GC") and Construction Managers ("CM") do not have insurance coverage for claims involving construction defects. Don't be fooled. If your contracts and your insurance are right, coverage should be available. Read on for a few short tips about getting that coverage.

The Truth: GCs and CMs Can Obtain Coverage for Construction Defect Claims Alleging Property Damage to Completed Operations, When Construction Defect Claims Typically Arise.

If you are a GC or a CM facing a construction defect claim, you are probably wondering how to obtain insurance coverage when your general

liability policy contains a "your work" exclusion. This exclusion typically provides that "the policy will not cover: 'Property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" "Your work" is defined by nearly all general liability policies as meaning "work or operations performed by you or on your behalf" and includes "the providing of or failure to provide warnings or instructions."

At first glance, this exclusion appears to be difficult to overcome. After all, it is your worksite, and, as GC or CM, you often hire subcontractors to carry out certain tasks on your behalf, right? If you are a GC or CM that does not perform construction activities yourself, you may be entitled to coverage. General liability policies commonly include an exception to the "your work" exclusion that "this exclusion does not



apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.” This means GCs and CMs that limit their activities to oversight, management, and general conditions have no “work” that can suffer property damage. *See, e.g., SW Design Build, Inc. v. Auto-Owners Ins.*, No. 3:16-CV-82, 2017 WL 5015524, at *9-10 (D.N.D. Sept. 29, 2017) (holding that “your work” exclusion did not apply where construction manager provided services in support of construction project and subcontractors did the actual construction work); *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, No. M2004-01233-COA-R3CV, 2005 WL 2293009, at *14 (Tenn. Ct. App. Sept. 20, 2005) (holding that “your work” exclusion did not apply where general contractor provided a supervisory role and subcontractors performed actual construction work). As a result, the “your work” exclusion does not apply to intangible decision making and coordination of work performed by others.

General liability policies also contain a “products-completed operations hazard” that includes coverage for:

“all ‘bodily injury’ and ‘property damage’ occurring away from premises you own or rent and arising out of ‘your product’ or ‘your work’ except:

1. Products that are still in your physical possession; or
2. Work that has not yet been completed or abandoned. However, ‘your work’ will be deemed completed at the earliest of the following times:
 - a. When all of the work called for in your contract has been completed.
 - b. When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - c. When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.”

In other words, construction defect claims for completed work are eligible

for coverage up to the amount of the Products/Completed Operations Aggregate shown in the policy's Declarations. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 891 (Fla. 2007) (holding that products completed-operations hazard coverage in general contractor's commercial general liability policy provided coverage where a claim was made against the contractor for damage to the completed project caused by a subcontractor's defective work). In some instances, coverage for products and completed operations may not have been obtained under the general liability policy, but may have been acquired as an independent coverage on substantially similar terms. GCs and CMs may also be able to obtain coverage from the contractual indemnification obligations and the insurance obligations of their subcontractors.

Take Away

The exclusion for "your work" only prevents coverage for property damage to the GC's or CM's own work from ongoing operations; coverage for "your [completed] work" is picked up in the products/completed operations hazard. ▲

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