

Business Risk Exclusions

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Contractors Risks

- Risk of not completing the job timely
- Risk of causing Bodily Injury or Property Damage to a third party
- Home may have items that require further repair
- Risk that interest rates may rise while the home is under completion causing increased costs
- Risk of injury to employees

Common Elements of a Construction Contract

- Contractors have capacity to complete work and provide materials in workmanlike fashion and
- Homeowner relies on these representations
- An expressed or implied warranty of merchantability and
- Implied or express warranty for a fitness of purpose

Complaints & Lawsuits

- What happens when homeowners complain of faulty of construction?
- What happens when homeowners complain of inadequate building materials?
- How does the typical Commercial General Liability policy respond?

Commercial General Liability Insurance

- A form of insurance designed to protect owners and operators of business from a wide variety of liability exposures.
- Designed to protect contractors from legal responsibility for negligent acts
- Protect contractors from wrongful acts which causes harm to others on their premises, from their operations, and for their products sold

Insurance Services Office, Inc. ("ISO")

Who exactly is
the Insurance
Services Office,
Inc?



ISO is...

- Draft Policy Forms
- 1986 Policy Changes
- The Litigation
- Drafting Committees Pre-1995
- Drafting Committees Post-1995
- The Future of ISO

Insuring Agreement

- We will pay those sums that insured becomes legally obligated to pay as damages because of BI or PD . . .
- Applies only if there is an occurrence
 - An accident or continuous or repeated exposure
 - PD is damage physical injury to tangible property or loss of use of that property

Are Construction Defects an Occurrence?

Two lines of cases

1.) Faulty or improper construction is not an occurrence, the damage is the natural and ordinary consequences of the insured's act

(L-J, Inc. v. Bituminous Fire & Marine Ins. Co. 621S.E.2d 33)

2.) Faulty or improper construction is an accident as long as it is an event that occurs without the insured's expectation or foresight

(U.S. Fire Insurance Co. vs. J.S.U.B., Inc. 2007 WL4440232)

The Business Risks Exclusions

- Care, Custody Control – Construction in Progress
- Damage to Your Product
- Damage to Your Work
- Damage to Impaired Property
- Recall of Products, Work or Impaired Property

Damage to Property

- (1) Property you own, rent, or occupy;
- (2) Property you sell, give away, or abandon, if the PD arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody, or control of the insured

Damage to Property (Cont.)

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

. . . Paragraph **(6)** of this exclusion does not apply to “property damage” included in the “products-completed operations hazard.”

Damage to Your Product

“Property damage” to “your product” arising out of it or any part of it.

- Includes warranties and representations
- Does not include real property

Damage to Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

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.

Damage to Impaired Property or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

Recall of Products, Work or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1)** "Your product";
- (2)** "Your work"; or
- (3)** "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

Example 1

Lumber provided by framing subcontractor is found to be defective and presents a high probability that it must be replaced as it may become unsafe over time. The homeowners face sue for the loss of use of their homes and diminution in their property value.

Coverage for framing subcontractor?

Coverage for Developer/GC?

Example 2

Substantial GC enters into a contract to design and build a multi-million dollar home. The GC completes all of the framing and installs the sheet metal. Clear Windows supplies and installs the windows.

Example 2 cont.

Substantial is subsequently sued by the homeowner for window water leaks that cause damage to the interior of the home, the framing members, drywall, flooring, and insulation.

Example 2 cont.

- Would Substantial be covered for the damage to the framing members if they were negligent in framing and/or building paper installation?
- Would coverage apply under Substantial CGL policy if the windows were the sole cause of the water leaks?