



## Current Articles 2008 – November

### The Court Rules on CGL Exclusion – Part II

Last month's article referred to the recent court decision in relation to a claim for defective concrete. In addition to liberal decision relating to the "Your Work" exclusion in the CGL, the court also interpreted the application of the "Your Product" exclusion.

The "Your Product" exclusion did not apply because of the exemption for an insured's property that was "real property". The definition of "your product" states "*Your product means: (a) any goods or products, other than real property, manufactured, sold, handled, distributed or disposed by (i) You; (ii) Others trading under your name....*" The "Your Product" exclusion is that: *the insurance does not apply to property damage to your product arising out of it or any part of it.*" Because of the exception for "real property" and the concrete was used for the building foundations, the court concluded that the exclusion was not applicable.

The third exclusion was an exclusion endorsement that had been added to the policy. This exclusion is called a "Rip and Tear Exclusion". My involvement in this case was solely dealing with this exclusion. The previous policy for the concrete contractor did not include a Rip and Tear Exclusion. When the policy was transferred to a new broker, the replacement policy included a Rip and Tear exclusion and which was not explained to the client. As you can imagine this gave rise to a very large E & O claim against the new broker.

The Rip and Tear exclusion states: *This policy does not apply to any liability for property damage for ripping and tearing expenses and restoration expenses*". Ripping and Tearing expenses shall mean the actual expenses incident to the intentional destruction and removal of concrete products which are found to be defective. There are other definitions applicable to this clause which space will not permit me to include. Basically, this endorsement limits the loss to the actual cost to replace the concrete but will not pay for the removal or replacing the concrete. As you can appreciate, the cost of the replacement concrete is minimal in comparison to the expenses such as relocation of residents, labour involved to jack up the house, replace the concrete, etc. plus additional claims for loss of sales of these new homes.

Because the insurer did not use a Rip and Tear exclusion which was the same for some 10 insurers but relied on their own wording, the judge defined it as being "unfortunately ambiguous and subject to various interpretations". He later stated: "the exclusionary clause, to remove coverage, has to be clear and unequivocal. In this case, it is not. The exclusion is subject to different interpretations". By deeming that the exclusion was ambiguous and later deemed unclear and thus unenforceable. The judge concluded "that the Rip and Tear exclusion would be repugnant to the insurance coverage and the court ought not to enforce the Rip and Tear exclusion. He also commented that the endorsement was poorly drafted and unenforceable. He confirmed that the Court will not rewrite incomprehensible exclusions **in favour of the insurer**.

From the above (and last month's article) the court ruled that the three exclusions should be dismissed. As a result the Court confirmed that the claims against the concrete installer were fully covered by the insurance policy.

On a side note, some insurers and subject to their underwriting rules may offer a "Defective Products Extension (Rip and Tear) endorsement. Do your concrete installers have such an endorsement or does your policy contain a Rip and Tear Exclusion? Is your client aware of the exclusion or aware of a correcting endorsement?

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