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Insuring Conflicts on the Construction Site

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Article abstract

Le but de cet article est d'examiner les plus récents développements en matière d'assurance construction. Une couverture globale et adaptée aux besoins exige les efforts et la maîtrise de différentes disciplines, notamment dans les domaines juridique et technique. L'auteur tente de démontrer comment le milieu de l'assurance peut répondre aux problèmes les plus particularisés par une analyse exhaustive des principales clauses et conditions en vertu de l'assurance des biens et de l'assurance des responsabilités. La deuxième partie de cet article a été publiée dans le numéro précédent.

Insuring Conflicts on the Construction Site*

by

Eric A. Dolden**

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PART THREE OF FOUR

H. Judicial Treatment of the Broad Form Property Damage Endorsement

1. General

In the construction setting the insurance industry has traditionally viewed both the performance bond and property coverage as being the primary means for correcting property damage which occurs within the confines of the project site. In contrast, the CGL was viewed as the vehicle which indemnified for the loss of third parties that incurred bodily injury or property damage consequential to the work under construction. That traditional dichotomy has been rendered illusory by the introduction of the Broad Form Property Damage Endorsement (hereafter "BFPE") as a supplement to the CGL. The BFPE, as an addition to a policy of

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liability insurance, provides first party insurance for the insured's work, including loss attributable to the risk of defective workmanship. In that sense the BFPE performs a role not unlike a performance bond or policy of property insurance and acts to "blur" the traditional distinctions between on one hand, the CGL, and on the other hand, property insurance and the performance bond.

In non-CCDC policies, including the IBC Form 2003, the BFPE amounts to a separate and self-contained endorsement in which the "work performed" and the "care, custody or control" exclusions are replaced by the following provision:

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This insurance does not apply to...

(y) property damage

(1) to property owned or occupied by or rented to the Insured, or, except with respect to the use of elevators, to property held by the Insured for sale or entrusted to the Insured for safekeeping

(2) except with respect to liability under a written sidetrack agreement or the use of elevators, to

(a) property while on premises owned by or rented to the Insured for the purpose of having operations performed on such property by or on behalf of the Insured;

(b) tools or equipment while being used by the Insured in performing his operations;

(c) property in the custody of the Insured which is to be installed, erected or used in construction by the Insured;

(d) **that particular part of any property**, not on premises owned by or rented to the Insured;

(i) upon which operations are being performed **on behalf of the Insured** at the time of the property damage arising out of such operations, or

(ii) out of which any property damage arises, or

(iii) the restoration, repair or replacement of which has been made necessary by reason of faulty workmanship thereon by or on behalf of the Insured;

(z) The insurance afforded by this endorsement shall be excess insurance over any valid and collectable Property Insurance (including any deductible portion thereof) available to the Insured, such as but not limited to Fire and Extended Coverage, Builders' Risk Coverage or Installation Risk coverage, and the Other Insurance condition is amended accordingly.

(emphasis added)

In the CCDC Form 101 CGL that same wording is achieved by the alteration of several existing exclusions including exclusion (h) for losses occurring during operations, exclusion (i) for losses arising during completed operations, and finally, by the addition of Condition #6 which ensures that the BFPE is excess to any property insurance. The resulting wording is not unlike the IBC wording noted above.

2. The Scope of coverage under the traditional Builders' All Risk

The use of the BFPE, as a limited form of first party property coverage, acquires added significance if one appreciates the role of the Builders' All Risk policy in providing coverage for the insured's own work product that causes loss to the third party during construction. The All Risk policy is unique among property policies in that it provides a limited form of indemnity if the "faulty workmanship" causes property damage to third parties. This Limited form of cover, in effect a grant of cover within an exclusion, is marketed as one of two wordings:

> This policy does not insure the cost of making good faulty or defective workmanship, material, construction or design, but this exclusion shall not apply to damage resulting from such faulty or defective workmanship, material, construction or design.

or:

> This policy does not insure... faulty or improper workmanship; provided, however, to the extent otherwise insured and not otherwise excluded under this Policy resultant damage to property shall be insured.

This limited coverage for consequential loss has given rise to two issues in the context of claims. Firstly, does the exception to the "faulty workmanship" exclusion afford indemnity for the insured's loss, or is it intended only to provide relief to third parties that sustain damage? Secondly, if the exception to the exclusion does embrace the insured's own loss, what portion of the insured's property is covered by reason of this limited coverage? These issues are clearly intertwined, and cause one to consider what additional coverage the BFPE affords.

Contractors have argued that some or all of the costs inherent in replacing a portion of he contractor's work can be recovered notwithstanding that the loss falls squarely within the "faulty workmanship" exclusion. Those attempts have been rather unsuccessful. Whether consisting of equipment or a partially constructed building, if the insured's property constitutes a single functional unit and that functional unit has incurred damage caused by "faulty workmanship", none of the property damage is treated as being resultant damage".

The leading case on this point is *Sayers & Associates Limited* v. *The Insurance Corporation of Ireland et al*,[1] a decision of the Ontario Court of Appeal. The subcontractor was hired to install electrical equipment throughout a new building, and to insure that any electrical work was protected from the elements. The sub-contractor failed to place protective coverings over some of the electrical openings and as a result rain water entered the electrical system. This formed a highly alkaline solution which ultimately caused an electrical malfunction. While conceding that the failure to use protective coverings amounted to "faulty workmanship", the sub-contractor argued that the ensuing damage to other but related equipment, as well as the cost of supplying temporary power to the

[1] [1981] I.L.R. 1-1436.

building, was recoverable on the basis of the exception to the exclusion.

The Ontario Court of Appeal rejected this submission. In the Court's view the scope of the electrical contractor's work, together with the necessary protective measures, were an integral part of the entire work and all ensuing loss could be treated as damage to the insured property, as opposed to damage **caused by the "faulty workmanship"**. Stated differently, since the protective measures were within the scope of the "work" to be performed, and not outside the scope of that work, the exception to the exclusion did not apply.

The reasoning in *Sayers & Associates Ltd.* (*supra*) has been followed in other construction contexts. In *Simcoe & Erie General Insurance Company* v. *Royal Insurance Company of Canada et al*[2] a dispute arose as to which of several insurers was obligated to defend and indemnify following the collapse of a Light Rapid Transit bridge over the Elbow River in Calgary. Evidence at the trial suggested that the cause of the collapse was the failure of the design engineer to make proper allowance for imbalanced weight loads. The superstructure of the bridge had to be replaced, at a cost of $636,945.46.

It was contended by the engineer's E & 0 insurers that the "exception" to the "faulty workmanship" exclusion obligated Royal Insurance, as the All Risk insurer, to indemnify for amounts other than damage attributable to the design error. Examples would include additional engineering costs in re-constructing a replacement bridge. That argument was based on the contention that the deficient section of the bridge, for insurance purposes, could be treated as being functionally separate from the other portions of the bridge which ultimately had to be replaced. This was in turn based on the premise that the damage to those latter sections was attributable to faulty workmanship and design. In concluding that the "design" was intended to encompass the entire bridge the Court rejected any arbitrary "severing" of the entire project, stating instead that the error

[2] (1982) 36 A.R. 353, (affirmed on appeal and leave to appeal to the S.C.C. refused at 51 N.R. 158n).

effected the entire structure. This meant that the exception to the exclusion did not apply. The Court stated:

> ...it appears abundantly clear to me that "design" encompasses the totality of the superstructure, and that each and every part of the superstructure was integral to the whole, and what in fact overturned into the Elbow river was the whole structure. The "design" was in my view fundamental to the whole, and when the design was in error, the whole of the superstructure was doomed to fail and did indeed fail.[3]

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None of the costs associated with the construction of the replacement bridge were treated as being within the exception to the exclusion. All of the steps taken to replace the totally failed structure were treated as being the direct consequence of the failed workmanship and therefore none of the cost was recoverable under the All Risk policy.

Simcoe & Erie General Insurance Co. v. *Royal Insurance Co.* (*supra*) represents judicial unwillingness to break an entire construction project down into separate component parts, for the purpose of determining coverage. The result is that there is very limited scope for "resultant" damages caused by the faulty workmanship. Is also shown in *Poole Construction Ltd.* v. *Guardian Assurance Company*.[4] Coffer dams had been erected in a river bed for flood control purposes. Once erected the coffer dams would facilitate construction of a bridge. The coffer dams failed and it was determined at trial that the loss was excluded by reason of the "design exclusion". Unlike the loss in *Simcoe & Erie General Insurance*, where the insured rebuilt the bridge, the insured in *Poole Construction Ltd.* did not rebuild the coffer dams. However, the court's comments provide some insight into the intended scope of the exception to the exclusion. Bowen, J. stated:

> ...the clear intent of the section is to make it clear that the insurer will not indemnify the insured for costs caused by the insured's own use of faulty workmanship, materials or design. To do otherwise would give the insured carte blanche to use

[3] *supra* at page 562.

[4] 1977] I.L.R. 1-879.

> faulty materials, workmanship or design. This opinion is bolstered by the fact that the second exception talks of 'damage resulting from', thereby alluding to an entirely different aspect of the matter. The original exception talks of the 'cost of making good faulty design'. That cost of making good covers the entire structure in this case. To make good the faulty design, the Plaintiffs had to remove the structure and fill the excavation. Those are the costs for which they ask to be indemnified and they come precisely within the exception.[5]

What these cases leave unanswered is whether there are circumstances in which the insured property could be 'severed' such that portions of the loss would be considered as falling within the exception to the exclusion. Very few cases have discussed this possibility. One Canadian decision, *Poole-Pritchard Canadian Limited* v. *The Underwriting Members of Lloyds*,[6] dramatizes the difficulties an insured would encounter in demonstrating that the loss is recoverable as damage caused by the "faulty workmanship". Although the decision in *Poole-Pritchard Canadian Limited* (*supra*) arose in the context of a liability policy, the narrow issue was whether the items being claimed were ones "arising directly or indirectly out of injury to or destruction of property, caused by accident, and arising out of the operations..." (emphasis added). The case is instructive because the policy contained an exclusion for the cost of making good faulty workmanship but not for loss or damage arising as a consequence of the faulty workmanship. The analysis is not unlike that white a court would need to undertake in considering an All Risk policy.

The loss arose upon the sub-contractor having supplied pipes to be utilized in the construction of a hydrocarbon treatment and sulphur plant. Steel bands, used as a fastener, corroded due to the presence of chlorides in the raw material. The issue was whether the insured could recover the cost of replacing the corroded steel bands. Mr. Justice Allan opined that the item was not recoverable as the cost was attributable to the faulty workmanship. Consistent with the later decisions in *Sayers & Associates Limited* (*supra*) and *Simcoe & Erie*

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[5] *supra* at page 635.

[6] [1970] I.L.R. 1-324.

General Insurance Co. (*supra*) the Court was inclined to treat the entire project as one unit that was incapable of being severed into discrete parts for insurance purposes. Commenting on what set of facts might trigger the exception to the exclusion Mr. Justice Allan stated:[7]

> I think the words used in the first clause, namely, this exclusion shall not be deemed to exclude loss or damage arising as a consequence of 'faulty workmanship, construction or design' are clearly referable to loss or damage other than the cost of repairing or replacing the faulty insulation work. For example, if, as a result thereof, the tanks themselves had been damaged or collapsed the loss thereby sustained might have been recoverable.

When these comments are taken together with the actual result in the *Sayers & Associates Limited* (*supra*) decisions, it would seem that the exception to the exclusion will only allow the insured to recover its damages, firstly, if the project or property is capable of being **functionally** divided into separate units and, secondly, if loss or damage was caused to property functionally separate from the insured property. In that sense recovery under the All Risk policy functions much like a liability policy by compensating for loss or damage caused to the property of a third party.

This analysis then raises the issue of whether there are any circumstances in which the exception to the exclusion is available to provide first party coverage as opposed to third party recovery. This is of significance given the desire of the contractor to similarly argue that the BFPE should provide recovery for first party loss. That issue remained largely unnoticed until the decision of the Saskatchewan Court of Appeal in *Bird Construction Co. et al* v. *United States Fire Insurance Co. et al.*[8] In *Bird Construction Co. et al* (*supra*), a roof truss had fallen and other trusses had to be altered to meet the need for additional bracing. The loss resulted from faulty procedures in erecting the trusses.

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[7] *supra* at page 920.

[8] [1986] I.L.R. 1-2047.

The insured argued that while the labour cost in installing the replacement truss was excluded, the insured was entitled to recover the acquisition cost of the replacement truss. The truss in question did not evidence faulty workmanship; the loss was caused by the method of installation. The insured argued that the acquisition cost of the replacement truss constituted damages **caused by** "faulty workmanship" That argument necessitated the Court of Appeal addressing whether the exception to the exclusion was limited to damage incurred by a third party or could allow for "first party" recovery, that is, by permitting the insured to recover the cost of its own material notwithstanding that the insured's employees, by their own carelessness, had caused the loss. In the opinion of Vancise, J.A., "resulting from" meant "something different than the cost of repairing the faulty work". Relying in large part on the decision in *Sayers & Associates et al*, the Court accepted that recovery was limited to damage caused to a third party and did not go so far as to provide indemnity for the property of the insured who was responsible for the "faulty workmanship".

A decision of the Quebec Superior Court, not widely reported outside of Quebec, serves to reinforce the approach taken by the Saskatchewan Court of Appeal in *Bird Construction* (*supra*). In *Golden Eagle Canada Ltd.* v. *The American Home Assurance Co.*[9] the insured sought recovery on an All Risk policy following a roof collapse of two storage tanks. The remaining roofs had to be replaced under threat of imminent collapse. While the initial loss was triggered by winter temperatures, the evidence at trial made it clear that the problems encountered would have occurred under even normal climatic conditions. The loss was excluded by reason of the "latent defect" exclusion, but the insured argued that the cost of replacing the tanks under threat of imminent collapse was recoverable by reason of the exception to the "faulty workmanship" exclusion. Expressing the opinion that it would be very surprising" that an exception clause would cause an insurer to be liable for a loss not covered in the first place by the insurance contract the Court stated:

> Obviously, what these words mean is that when the collapse of a property, ascribable to an error in design or an inherent

[9] [1978] C.S. 699.

> vice, causes damages to other properties covered by the insurance, the Insured will be entitled to recover for the losses thus sustained despite the fact that the original loss or damage, not being from an external cause, would not be covered. In other words. the original collapse resulting from an internal cause could become an external cause concerning the damages caused by such collapse to other insured properties.[10]

In both *Bird Construction* (*supra*) and *Golden Eagle Canada Ltd.* (*supra*) the courts have narrowed the ambit of the exception to
138 the exclusion by requiring that the loss consist of damage caused to the interest of a third party who has provided materials or tangible property to the insured property. An example might include the sub-contractor that supplies equipment to the construction site and sustains a loss of equipment as a result of the general contractor's faulty workmanship. The equipment supplier can obtain indemnity if the supplier can demonstrate that its property is not functionally integrated into the entire work or structure that is the subject matter of the All Risk policy. It is noteworthy, however, that the courts are willing to go a considerable distance to find that the property of the third party constitutes an integral portion of the entire subject matter of the All Risk policy and that the third party is therefore not entitled to recovery.

These cases demonstrate that the insured cannot create coverage from the exception to the exclusion if in fact that loss is attributable to conduct that falls within an exclusion. This conclusion is consistent with related principles of insurance law that coverage must arise from the operative words of the insuring agreement (ie "all risk of physical injury") and not indirectly by reason of an exception to an exclusion.

3 . The Scope of contractor coverage under the BFPE

In response to the unwillingness of the courts to treat the exception to the "faulty workmanship" exclusion as a limited form of property coverage contractors have increasingly sought to rely upon the BFPE as first party insurance for work done "by or on behalf of the insured". This has occurred notwithstanding that the CGL was

[10] *supra* at p. 702.

never intended to reimburse the contractor for damage caused to his work by his own or a subcontractor's defective workmanship.

While there is a dearth of decided authority in Canada, what jurisprudence exists in the United States suggest that in respect of losses arising following substantial completion, falling within the CGL's "completed operations" hazard, the BFPE will not allow the contractor to recover repair costs associated with the remedying of its own work but will allow recovery of repair costs needed to correct the sub-contractor's "work". This is so notwithstanding that the general contractor had contractual responsibility for the entire work.

(a) The Contractor's ability to recover construction losses involving its own work:

The decision in *C.D. Walters Construction Co.*[11] v. *Fireman's Ins. Co.* is one of the few cases that examine the scope of the BFPE in the context of a loss which arose during construction operations. The insured had been hired to clear a road on 6 acres of land and it was alleged that during operations the insured removed some trees and dug a trench contrary to the owner's instructions. The insured sought coverage relying upon the BFPE. The South Carolina Courts of Appeal concluded that the BFPE did not allow indemnity for the contractor's own work and faulty workmanship flowing therefrom.

(b) The contractor's ability to recover for post-construction losses involving its own work:

Illustrative of cases in which the general contractor has sought indemnity for repair costs for its own work arising after completion of the project is *Taylor-McDonnell Construction Co.* v. *Commercial Union Insurance Co.*[12] This decision of the Montana Supreme Court examined the right of a contractor to rely upon the BFPE for indemnity as a result of a loss arising after substantial completion. The insured had been hired to construct a museum roof. Two years after the work was completed the roof began to leak. Action was commenced against the insured claiming damages for poor workmanship and materials, negligence and breach of contract. The damages included the cost of repairs and replacement of the roof.

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[11] 316 S.E. 2d 709 (S.C. App. 1984).

[12] 744 P. 2d 892, a 1987.

The insured had obtained, as a supplement to the CGL, a BFPE, expressed to be in substitution for the "work performed" exclusion, worded as follows:

> With respect to the completed operations hazard and with respect to any classification stated above as 'including completed operations', to property damage to work performed by the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

140 It is noteworthy that the language was not dissimilar to exclusion (j) of the CCDC Form 101 and the related IBC endorsement.

Noting that the only property damage being complained of was that part of the property upon which operations were being performed by the insured, and not "other property", the Court, without much analysis, concluded that the BFPE did not afford coverage.

(c) The contractor's ability to recover for post-construction losses involving the sub-contractor's work:

Not unlike the judicial treatment of the "product itself" exclusion, decisions concerning the proper scope of the BFPE are divided. It is instructive to examine these divergent lines of authority.

The more compelling United States authorities reflect a restrictive approach in the treatment of the BFPE in the context of losses arising during the "completed operations" phase. Reflective of this restrictive approach is the decision of the Supreme Court of Minnesota in *Knutson Construction Company* v. *St. Paul Fire & Marine Insurance Co.*[13] In *Knutson Construction Company* (*supra*) the Minnesota Court of Appeals opined that the BFPE does not act to provide indemnity for the general contractor's completed building following substantial completion. In the Court's view, to hold otherwise would serve to convert the CGL into a type of performance bond that would compensate the general contractor for its failure to exercise proper workmanship. That, in the Court's

[13] 396 NW2d 229.

view, is tantamount to imposing upon a liability insurer a business risk that is entirely within the control of the contractor.

In *Knutson Construction Limited* (*supra*) the insured obtained a CGL that included "completed operations" coverage and a BFPE in connection with the construction of an apartment building. The insured had agreed to construct the apartment building according to plans and specifications prepared by architects and engineers, and secondly, to correct any defects due to faulty materials or workmanship for a period of one year following the date of substantial completion. Prior to having commenced work the contractor had subcontracted much of the work including the installation of windows, prefabricated brick masonry panels, plumbing, heating and ventilation. Four years following completion of the building the owner detected cracks, staining and chipping on the exterior brick of the building. The owner commenced action to recover its repair costs, claiming both negligence and breach of contract against the insured.

The insured argued that the BFPE, by deleting the words "or on behalf of", suggested that the general contractor was entitled to indemnity for those losses attributable to the workmanship of the subcontractor. The Minnesota Court of Appeal rejected this argument, stating that notwithstanding that the general contractor had subcontracted much of the work the completed structure became the contractor's "product" at the moment the completed building was turned over to the owner. Regardless of who was to bear immediate responsibility for the work during construction, upon the project being completed all of the work performed and materials supplied by the various subcontractors in effect "merged" into the completed building which the general contractor turned over to the owner. The general contractor, by reason of its contract, assumed the business risk inherent in any loss that ensued by virtue of its contractual promise that the building would be constructed in a "good and workmanlike" manner. Since the entire completed building fell within the scope of the "work performed" exclusion there was, in the Court's view, no basis for the BFPE to afford indemnity.

It is noteworthy that the Minnesota Court adopted, with approval, comments made some years earlier by the Florida Court of

Appeal, in *Tucker Construction Co.* v. *Michigan Mutual Insurance Co.*[14], in which that Court had stated:

> The deletion of the phrase relating to subcontractors in the exclusion in the completed operations policy makes sense because the insured contractor has presumably accepted the subcontractor's work as his own (at least 50 far as its potential tort liability is concerned), and has turned the completed work over to the owner by the time such a complete operations policy is operative.

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> In effect the applicable exclusion provides that the 'completed operations' hazard coverage does not apply 'to property damage to work performed by the named insured arising out of such work or any portion thereof'. The words 'work performed by' in this context in the policy mean the same as 'the restaurant constructed by' the insured and was intended to exclude coverage of the insured's contractual liability for damages to the 'work' caused by the insured's neglect or failure to complete and deliver the completed 'work' in accordance with his contractual undertaking with the owner

Whether in the context of the "product itself" exclusion or of the BFPE, the obligation to repair defective work or to replace defective materials is not a matter for indemnity pursuant to the CGL, with or without a BFPE.

Judicial response to the BFPE has not been uniform. There exists a distinct line of cases which adopt the view that the insurance industry, by replacing the "work performed" and "care, custody or control" exclusions with a narrower exclusion, usually for an additional premium, intended to confer upon contractors a form of additional coverage in instances involving loss to the sub-contractor's work.

Illustrative of this alternate line of case is the decision in *Southwest Louisiana Grain, Inc.*v. *Howard A. Duncan, Inc.*[15], in which the Louisiana courts concluded that BFPE, when read together with the "work performed', exclusion, created an ambiguity, and

[14] 423 So.2d 525 (Fla. App. 1982).

[15] 438 So.2d 215 (La Ct. App., cert. denied, 441 So. 2d 1224)

therefore ought to be construed in a manner favorable to the insured by treating the BFPE as conferring a form of coverage.

In *Southwest Louisiana Grain, Inc.* (*supra*), the general contractor had been retained to design and construct a grain elevator and storage facility for the owner. The only portion of the work actually performed by the general contractor was to design the buildings and provide site supervision. The work of actually constructing the structure was undertaken by a sub-contractor. That fact figured prominently in the Court's reasoning. Following substantial completion the foundation of the grain elevator and storage facility began to crack. The owner brought action against the general contractor seeking damages for property damage and loss of income. The primary coverage included both "completed operations" and a BFPE that extended to "completed operations". The effect of the BFPE was that the exclusion:

> This insurance does not apply:
>
> (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, part, or equipment furnished in connection therewith

was replaced by an exclusion that read:

> This insurance does not apply:
>
> (z) with respect to the completed operations hazard, to property damage to work performed by the named insured arising out of the work or any portion thereof, or out of materials, part or equipment furnished in connection therewith.

Whereas the "work performed" exclusion purported to exclude the insured's entire building the BFPE **only excluded work undertaken by the insured and not work performed at the direction of the insured including subcontractors.** That caused the court to address whether the BFPE was available to indemnify the general contractor for the loss caused to the sub-contractor's work product.

In the Court's view the term "work performed" as utilized in the BFPE must entail some form of permanent and tangible structure. So, for example, if the general contractor's work merely consisted of a service, for example, surveying the site or preparation of its design, then any damage to the tangible portion of the completed structure, being outside the definition of "work performed", was not excluded by reason of the BFPE. Viewed that way, the BFPE retains the exclusion for property damage to work performed by the insured arising out of the work, but eliminates coverage for damage to work performed on behalf of the insured. So, if the subcontractor's work sustained damage attributable to an unstable foundation, the subcontracted work should be covered.

The Court acknowledge that the "product itself" exclusion is in conflict with this interpretation of the "work performed" exclusion, but given the ambiguity in its wording, any doubt as to the proper interpretation of these clauses ought to be resolved in favour of the insured. It is apparent from the decision of the Court that it was not prepared to treat each exclusion as being read separate and independently. In effect, the exclusions wee to be read together to identify the scope of indemnity

The practical effect was that the general contractor, whose only task it was to design the building and survey the site, gained indemnity for damage caused to the building itself as that had been erected by the subcontractor.

Consistent with the decision in *Southwest Louisiana Grain Inc.* (*supra*) is the decision of the Texas Court of Appeal in *Mid-United Contractors, Inc.* v. *Providence Lloyds Insurance Co.*[16] *Mid-United Contractors* (*supra*), when read together with *Southwest Louisiana Grain Inc.* (*supra*), is completely at variance with the decision i *Knutson Construction Ltd.* (*supra*) and *Tucker Construction Ltd.* (*supra*).

In *Mid-United Contractors* (*supra*) the insured had been hired to construct an office building for the owner. Following substantial completion the owner alleged that prefabricated brick panels were improperly installed. The issue was whether the insured was entitled

[16] 754 SW2d 824 (Tex App - 1988).

to a defence by reason of the BFPE. The BFPE in issue in *Mid-United Contractors Ltd.* (*supra*) provided:

> The insurance for property damage liability applies, subject to the following additional provisions:
>
> (A) Exclusions (k) and (o) are replaced by the following:
>
> (2) except with respect to liability under a written sidetrack agreement of the use of elevators...
>
> (d) to that particular part of any property not on premises owned by or rented to the insured...
>
> (iii) the restoration, repair, or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured
>
> (3) with respect to the completed operations hazard and with respect to any classification stated in the policy or in the company's manual as "including completed operations" to property damage to work performed by the named insured arising out of such work or any portion thereof, or out of such materials, parts of equipment furnished in connection therewith.

The insured's position was that the BFPE replaced some of the exclusions contained in the CGL and thereby extended coverage to property damage resulting from the actions of any subcontractors.

The Court acknowledged that the purpose of the BFPE was to replace the "care, custody or control" and the "work performed", exclusions. Commenting upon the effect of the BFPE the Court remarked:

> The endorsement narrows the application of the two exclusions to the particular part of the property with which the insured or its subcontractor had contact in causing the loss... the insured is protected by the endorsement's completed operation coverage when the insured is legally liable for property damage to the work of a subcontractor, to the work of the insured or other

subcontractors arising from the work of a subcontractor of the insured. **In other words, although [the general contractor] would have no insurance coverage for damage to its work or arising out of its work, [the general contractor] was covered for damage to its work arising out of a subcontractor's work. By contrast, absent any endorsement, under exclusions (k) and (o), any property damage to work completed by [the general contractor] or on behalf of appellant bu its subcontractors would be excluded.**

(emphasis added)

[To be continued in our next issue.]