

California Insurance Law Coverage Newsletter for Attorneys

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FAULTY WORKMANSHIP

§ F16:1. In general

Contractors general liability policies contain an exclusion stating that the policy's do not apply: "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." See § B49 BY OR ON BEHALF OF [INSURED, OWNER, LANDLORD]. [*George F. Hillenbrand, Inc. v. Insurance Co. of North America*, 104 Cal. App. 4th 784, 793–794, 128 Cal. Rptr. 2d 586 (3d Dist. 2002)] By *implication* the policies therefore cover: (1) damage to the building if it was due to *some cause other than* the contractor's own faulty workmanship, such as improper maintenance by others, defective materials, or design; and (2) damage to property other than work caused by the insured's faulty workmanship. [*George F. Hillenbrand, Inc. v. Insurance Co. of North America*, 104 Cal. App. 4th 784, 128 Cal. Rptr. 2d 586 (3d Dist. 2002)] The courts do not look to see whether noncovered acts predominate in the third party's action, but rather to whether there is *any potential* for liability under the policy. [*George F. Hillenbrand*, 104 Cal. App. 4th at 801] See § Y3 YOUR WORK: ARISING OUT OF; § E49 EXCLUSIONS; § O41 OTHER PROPERTY.

See § C107 CONTRACTOR'S LIABILITY POLICY; § C53 COMPLETED OPERATIONS; § C85 CONSTRUCTION DEFECTS; § D43 DIMINUTION IN VALUE; § P95 PRODUCT HAZARD; § P107 PROPERTY DAMAGE—LIABILITY

POLICY; § W7 WATER; § Y3 YOUR WORK; PERSONAL LIABILITY UNDER POLICY.

§ F16:2 Faulty workmanship defined

'Faulty workmanship' is susceptible to at least two different interpretations:

1. The flawed quality of a finished product, or
2. A flawed *process*. Failing to put a temporary cover over the exposed premises by roofer which subsequently permits water to cause damage would not be 'faulty workmanship' under the flawed product interpretation as that interpretation necessarily requires the presence of an *object to evaluate*. [*Allstate Ins. Co. v. Smith*, 929 F.2d 447, 449–450 (9th Cir. 1991)]

There are at least two dictionary definitions of 'workmanship': (a) something effected, made, or produced: WORK; (b) the art or skill of a workman: CRAFTSMANSHIP. [*Allstate Ins. Co. v. Smith*, 929 F.2d 447, 450 (9th Cir. 1991), referring to Webster's Ninth New Collegiate Dictionary, pg. 1359 (1984)] The first definition supports a *product* interpretation, while the *second* definition supports a *process* interpretation. [*Allstate Ins. v. Smith*, *supra*] See § R11 REASONABLE INTERPRETATION.

§ F16:3 Contractor's sole independent act of negligence—CGL policy

Faulty workmanship can be caused solely by the contractor and therefore independent from an act of a subcontractor. See § F16 FAULTY WORKMANSHIP [§ F16:3] A determination of sole fault on the part of the general contractor is an important one. A determination of sole fault will serve to determine the existence of or absence of

an insurer's duty to defend and/or whether indemnity is owing to the insured/ contractor either under:

(1) the general contractor's policy [**§ C107 CONTRACTOR'S LIABILITY POLICY [§ C107:12 Workmanlike; failure to perform], [§ C107:12.1 Liability policy, coverage for negligent design], [§ C107:14 Additional insured endorsement], [§ C107:17 CGL exclusion under Coverage A for damage to property owned by insured or repairing the insured's work]**]. Where there is liability on the general contractor it does *not* follow that liability shall coexist against the subcontractors. [*National Union Fire Ins. Co. v. Nationwide Ins. Co.*, 69 Cal. App. 4th 709, 718, 82 Cal. Rptr. 2d 16 (4th Dist. 1999)]

(2) Under an additional insured endorsement [**§ A19 ADDITIONAL INSURED ENDORSEMENT [§ A19:2.1 to § A19:2.4]**].

(3) Under a subcontractor's liability policy. [**§ S100 SUBCONTRACTOR'S POLICY [§ S100:3]**].

§ F16:3.1 Contractor solely at fault, no coverage under additional endorsement to subcontractor's policy; absence of vicarious liability

A general contractor named as an additional insured under a subcontractor's policy is not entitled to a defense or indemnity where the general contractor is 100% at fault. [*National Union Fire Ins. Co. v. Nationwide Ins. Co.*, 69 Cal. App. 4th 709, 719–720, 82 Cal. Rptr. 2d 16, 22 (4th Dist. 1999)] See **§ C104 CONTRACTOR'S LIABILITY POLICY [§ C107:14]; § N4 NEGLIGENCE OF INSURED [§ N4:9]**.

§ F16:3.2 Illustrations of independent acts of negligence

Independent acts of negligence can take various forms:

1. *Inadequate remedial action or inaction* to remove a hazard. [*National Union Fire Ins. Co. v.*

Nationwide Ins. Co., 69 Cal. App. 4th 709, 717, 82 Cal. Rptr. 2d 16 (4th Dist. 1999)]

2. Contractor's acts can be distinct from supervision of subcontractor's work. [*National Union Fire Ins. Co. v. Nationwide Ins. Co.*, 69 Cal. App. 4th 709, 720, 82 Cal. Rptr. 2d 16 (4th Dist. 1999)]

3. *Scheduling work*. [*Casualty Ins. Co. v. Northbrook Property & Cas. Ins. Co.*, 150 Ill. App. 3d 472, 103 Ill. Dec. 495, 501 N.E.2d 812, 815 (1st Dist. 1986) (failure to coordinate work, allowed workman to work near a crane; crane fell causing injury, potential liability triggered by allegations in the third party complaint; duty to defend.)]

4. *Coordination of work*. [*Casualty Ins. Co. v. Northbrook Property*, supra]

5. *Inspecting work*. [*Casualty Ins. Co. v. Northbrook Property*, supra]

6. *Control work*. [*Casualty Ins. Co. v. Northbrook Property*, supra]

§ F16:3.3 Supervision defined

Webster's Third New International Dictionary, unabridged, defines *supervision* as (1) the act, process or occupation of supervising: direction, inspection, and critical evaluation. [*Union Elec. Co. v. Pacific Indem. Co.*, 422 S.W.2d 87, 93 (Mo. Ct. App. 1967)]

The same authority defines *supervise* as: (1) look over, inspect, oversee. [*United Electric Co. v. Pacific Indem. Co.*, supra]

Prime contractor supervision

A prime contractor supervises the work of a subcontractor only to the extent necessary to see that the work is done in accordance with the contract and specifications. 'General supervision' does not connote *control* of the means to accomplish the required results. [*Union Elec. Co. v. Pacific Indem. Co.*, 422 S.W.2d 87, 94 (Mo. Ct. App. 1967)]

§ F16:3.4 Supervision as an occurrence

Negligent supervision can constitute an occurrence under a CGL policy. [*Westfield Ins. Co.*

v. *TWT, Inc.*, 723 F. Supp. 492, 495 (N.D. Cal. 1989)]

§ F16:3.5 Public policy; contractor solely at fault

There is no indemnity for losses caused by a general contractor's sole negligence or willful misconduct. This comports to a statutory prohibition against allowing an indemnitor [e.g. subcontractors) to hold harmless an indemnitee's sole negligence in construction contracts. [CC § 2782, *National Union Fire Ins. Co. v. Nationwide Ins. Co.*, 69 Cal. App. 4th 709, 717, 82 Cal. Rptr. 2d 16 (4th Dist. 1999)] It is against *public policy* for a general contractor to use its economic clout to preemptively transfer the risks of its own *sole negligence* to fault-free subcontractors. [*National Union Fire Ins. Co. v. Nationwide Ins. Co.*, 69 Cal. App. 4th 709, 717, 82 Cal. Rptr. 2d 16 (4th Dist. 1999)]

OBSERVATION:

Civil Code § 2782 which limits the scope of an indemnity agreement does not negate additional insured coverage under a CGL policy. Civil Code § 2782 limits the scope of potential indemnity promises in construction contracts. Civil Code § 2782 does not affect the validity of any insurance contract. [*American Cas. Co. of Reading, PA. v. General Star Indem. Co.*, 125 Cal. App. 4th 1510, 1515, fn. 1, 24 Cal. Rptr. 3d 34 (2d Dist. 2005)] See **§ A19 ADDITIONAL INSURED [§ A19:2.2]; § P90 PROCURING AND MAINTAINING INSURANCE [§ P90:3]**

§ F16:3.6 Risks outside contractor's control; broad form endorsement

A general contractor's liability policy may insure against risks outside the general contractor's control. Having selected subcontractors, a general contractor may have little or no effective control over the manner in which subcontractors perform work. There are many situations where a general contractor knows little, if anything, about the exigencies of a subcontractor's work. An example is the soil testing performed prior to a construction

project, which typically is subcontracted. Consequently it is not out of the question that policies are drafted to cover risks from a subcontractor's work. From this perspective a prime contractor may obtain coverage against such unknown risks. [*Maryland Casualty Co. v. Reeder*, 221 Cal. App. 3d 961, 973, 270 Cal. Rptr. 719 (4th Dist. 1990)] See **§ B23 BROAD FORM COVERAGE.**

Prime contractor supervision

A prime contractor supervises the work of a subcontractor only to the extent necessary to see that the work is done in accordance with the contract and specifications. 'General supervision' does not connote *control* of the means to accomplish the required results. [*Union Elec. Co. v. Pacific Indem. Co.*, 422 S.W.2d 87, 94 (Mo. Ct. App. 1967)] See **§ C105.01 CONTRACTOR'S SOLE INDEPENDENT ACT OF NEGLIGENCE [§ C105.01:1] § S122 SUPERVISION [§ S122:1]**

§ F16:3.7 Contractor's negligence excluded under the policy; there still may be coverage for a 'defense' [duty to defend]

Contractor's negligence is usually excluded under a CGL policy. If so the contractor stands its own replacement and repairs. See **§ C107 CONTRACTOR'S LIABILITY POLICY [§ C107:1, § C107:3.1]**. A contractor's exclusion is a reference to a policy exclusion that excludes **YOUR WORK**. See **§ Y3 YOUR WORK [§ Y3:1, § Y3:3, § Y3:5]**.

Coverage/duty to defend exists if:

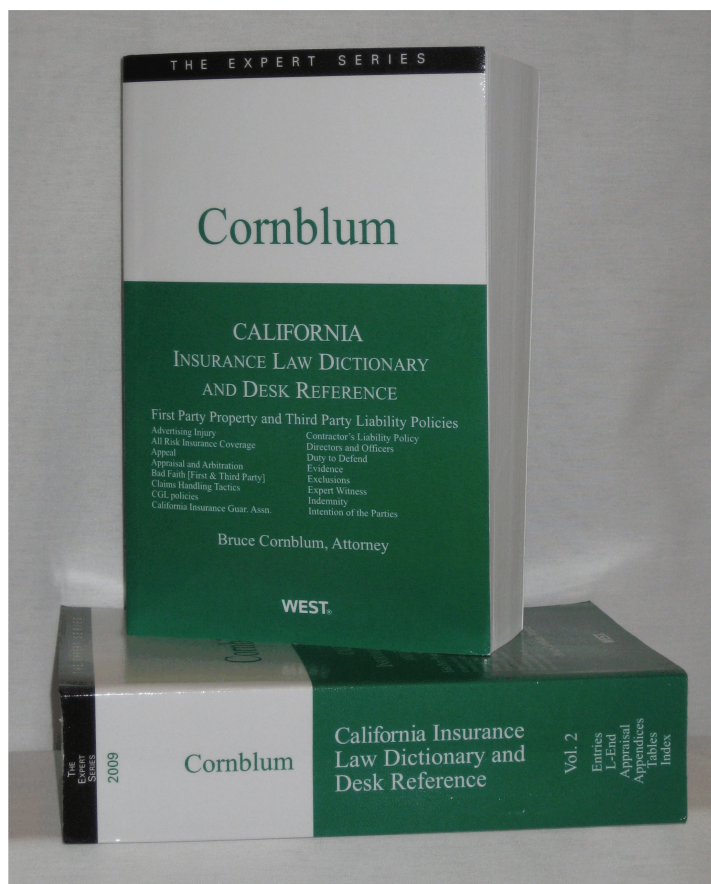
1. *Faulty workmanship is caused by others.* If damage to the property is caused by a cause other than the contractor's own fault, workmanship such as (a) improper maintenance by others, (b) defective materials or design, (d) damage to property other than work performed by insured there exists potential liability under the policy. [*George F. Hillenbrand, Inc. v. Insurance Co. of North America*, 104 Cal. App. 4th 784, 801, 128

Cal. Rptr. 2d 586 (3d Dist. 2002)] See § **C107 CONTRACTOR'S LIABILITY POLICY** [§ **C107:8**]; § **Y3 YOUR WORK** [§ **Y3:5**]; § **O41 OTHER PROPERTY** [§ **O41:2**]

2. Contractor *POTENTIALLY* free from fault. The YOUR WORK exclusion only applies to exclude the insured's work, if the court or jury has found (at the end of the trial) that the contractor's work was defective, which defect caused the plaintiff injury or damage. See *Schmitt v. NIC Ins. Co.*, 2007 WL 3232445 (N.D. Cal. 2007). A contractor's policy excludes the insured's independent negligence. Prior to a court determination of the existence of such negligence, the insured potentially could be found to be free from any fault. Therefore, during this period from

the third party's filing of a suit to summary judgment or judgment after trial, the insured is entitled to a defense from the insurer. [*Schmitt v. NIC*, supra, page 10]; see also § **P67 POTENTIAL LIABILITY** [§ **P67:11 Denial of coverage based upon the existence of an exclusion**]. An insurer has a duty to defend its insured when the applicability of an exclusion will not be determined until the underlying suit is resolved. [*George F. Hillenbrand, Inc. v. Insurance Co. of North America*, 104 Cal. App. 4th 784, 803, 128 Cal. Rptr. 2d 586 (3d Dist. 2002), citing *Cal-Farm Ins. Co. v. TAC Exterminators, Inc.*, 172 Cal. App. 3d 564, 218 Cal. Rptr. 407 (2d Dist. 1985).] See § **C109.01 CONTRACTOR'S SOLE INDEPENDENT ACT OF NEGLIGENCE—CGL POLICY** [§ **C109.01:8**]

The above **BOLD** references are to *California Insurance Law Dictionary and Desk Reference* (2009 Edition)



The 2009 Two-Volume Edition of CALIFORNIA INSURANCE LAW DICTIONARY AND DESK REFERENCE (15th Edition of the Dictionary - 4000 pages) authored by Attorney Cornblum is available through Thomson West. To order this text call Thomson West at 1-800-344-5008.