

The Evolution of the “Your Work” Exclusion and Strategies for Keeping Your Subrogation Recovery Out of Its Grasp

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History of the “Your Work” Exclusion

The Standard “CGL” Policy

- Began in 1940's
- Originally written for a specific hazard
- ISO standardization (1970's – present)

The Standard “CGL” Policy

- b. This insurance applies to "bodily injury" and "property damage" only if:
 - (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

The Standard “CGL” Policy

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Judicial Interpretation

“if a contractor uses inadequate building materials, or performs shoddy workmanship, he takes a calculated business risk that no damage will take place. If damage does take place, it flows as an ordinary and natural consequence of the contractor’s failure to perform the construction properly or as contracted [and] [t]here can be no coverage for such damage.”

- *Viking Construction Management, Inc. v. Liberty Mut. Ins. Co.*, 358 Ill.App.3d 34, 42, 831 N.E.2d 1 (2005)

Judicial Interpretation

“That which is intended is, by definition, not accidental...A general liability policy is not intended to provide coverage for those risks which are within the insured’s control...Since the quality of construction is always within the control of the contractor...any loss which results from poor workmanship cannot possibly be considered fortuitous.”

- *Cincinnati Insurance v. Motorists Mutual Insurance Co.*, 306 S.W.3d 69 (Ky. 2010)

STRATEGY

Argue that this broad interpretation of “occurrence” renders the “your work” exclusion meaningless

The Standard “CGL” Policy

Exclusion:

I. 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.

The Standard “CGL” Policy

Exclusion:

- (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

The Standard “CGL” Policy

Exclusion:

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

“That Particular Part”

(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.

“That Particular Part”

- **Moment of occurrence v. Full project**
 - *Essex Ins. Co. v. Kart Constr., Inc.*
 - 2015 WL 4730540 (Fla. 2015)
- **Defective v. Non-defective**
 - *Greystone Const. Inc. v. National Fire & Marine*
 - 661 F.3d 1272 (10th Cir. 2011) (Colorado)
- **Other property v. “Your work”**
 - *Cogswell Farm v. Tower Group*
 - 110 A.3d 822 (N.H. 2015)
 - “ambiguity exists...construed against insurer.”

Evolution of the “Your Work” Exclusion

“Your Work” Rationale

“It is well established that the purpose of comprehensive liability insurance coverage is to provide protection for personal injury or property damage caused by the product only and not for the replacement or repair of the product. The policy reasons for this result are obvious. If insurance proceeds could be used to pay for the repairing and/or replacing of poorly constructed products, a contractor or subcontractor could receive initial payment for its work and then receive subsequent payment from the insurance company to repair and replace it. Equally repugnant on policy grounds is the notion that the presence of insurance obviates the obligation to perform the job initially in a workmanlike manner.”

- *Centex Homes Corp.*, 444 So.2d 66, 67 (Fla. 1984)

“Your Work” Rationale

- 1) Prevents double pay
- 2) Maintains responsibility and obligation of contractor to perform quality work
- 3) Insurance not a performance bond

“Your Work” Rationale

Me (Owner) \$\$ ➡ Theesfeld Co. (General)



ABC Insurance Co.

“Your Work” Rationale

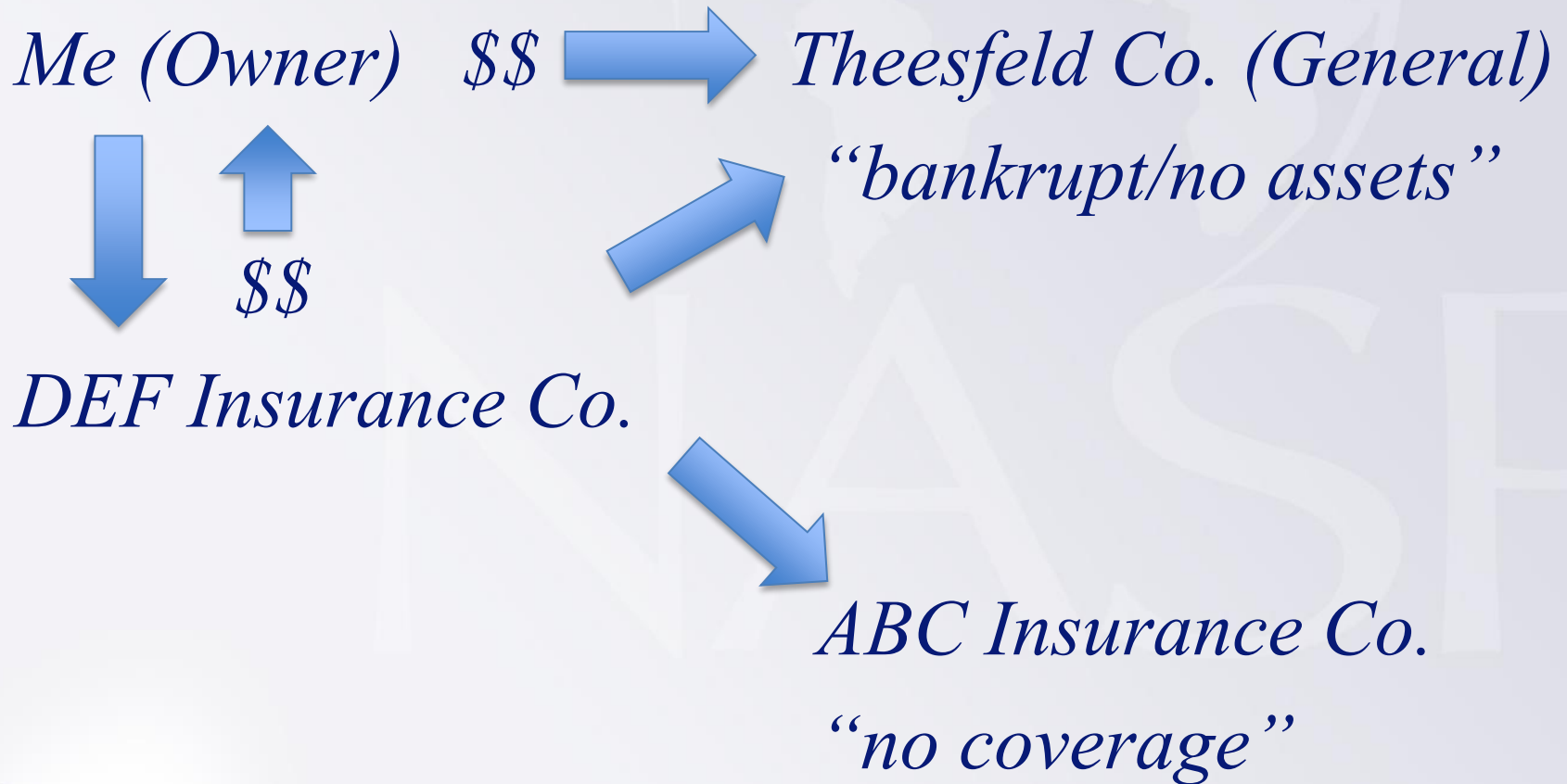
Me (Owner) \$\$ ➡ Theesfeld Co. (General)



DEF Insurance Co.



“Your Work” Rationale



Factual Scenarios

- New Foundation (*Grinnell Mut. v. Lynne*, 686 N.W.2d 118, (N.D. 2004))



Factual Scenarios

- Shingles (*Auto-Owners v. Home Pride*, 684 N.W.2d 571 (Neb. 2004))



Factual Scenarios

- Road Projects (*L-J, Inc. v. Bituminous Fire and Marine*, 621 S.E.2d 33 (S.C. 2005))



Factual Scenarios

- Stucco (*Lennar Corp. v. Great American Ins. Co.*, 200 S.W.3d 651 (Tex. 2006))



Factual Scenarios

- Landscaping (*Pacific Indemnity v. Lampro*, 86 Mass. App. Ct. 60 (Mass. 2014))



Exceptions, Enhancements and Other Avenues to Recovery

Subcontractor Exception

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.

Subcontractor Exception

- Foundations (*American Girl*, 673 N.W.2d 65 (Wis. 2004))



Subcontractor Exception

- ***Warning...ISO has drafted endorsement which eliminates subcontractor exception.***
- *See Grinnell Mutual Reinsurance Company v. Wollak Construction, Inc., Civ. No. 10-350 (RHK/LIB) (D. Minn. Oct. 15, 2010)*
- *Breese Homes, Inc. v. Farmers Ins. Exchange, 227 Or. App. 587, 206 P.3d 1091 (2009) (general chose subcontractor).*

Enhancements in Policy

a. The following is added to **SECTION 1
COVERAGE A BODILY INJURY AND
PROPERTY DAMAGE LIABILITY**:

(1) We will pay those sums that you become legally obligated to pay as damages because of unintentional "property damage" to property of others in your care, custody, or control.

Other Policies

- **Builder's Rick Policy**
 - First-party coverage
 - Designed specifically to protect against liability for direct physical loss or damage to a structure or project during construction
 - Also called “course of construction” insurance
- **Errors & Omissions Insurance**
- **Excess and Umbrella Policies**

Final Avenues Toward Recovery

- *Claim Assignment*
- *Illusory Coverage*
- *Questions?*