

From the Editor

Jim Nyeste, Managing Co-Editor and member of the Insurance Law Section Council

Why do Illinois courts use an abbreviated coverage analysis for construction defect claims?

A surgeon likely will have coverage for his poor workmanship. But the lowly carpenter, roofer, or other tradesperson who makes an unintentional error in the construction of a building? Probably not. Of course, there are many differences between professional liability policies and commercial general liability policies in terms of their coverage grants and exclusions, but Illinois courts look at construction defect claims differently on the very threshold. The surgeon's negligence will be seen as insurable without question, but the tradesperson's unintentional error leading to a construction defect will be characterized as "shoddy workmanship" and a breach of warranty and will be deemed non-fortuitous and uninsurable. With few exceptions, Illinois cases hold that construction defects are not the result of "accidents" and not insurable. The coverage analysis then does not need to go beyond the insurance policy's coverage grant to examine the policy's exclusions or other provisions. In many cases, exclusions or other policy provisions would defeat liability coverage for the construction defect claim. The "business risk" exclusions prevent coverage for repairing or replacing property on which the contractor performed defective "work," for property damage to the contractor's "work," and for loss of use of "impaired property," but Illinois courts usually don't even try to apply these exclusions because they cut short the analysis by holding that the construction defect was not the result of an accident.

However, if the construction defect is coupled with damage to other property, such as tenants' contents within the building, Illinois cases hold that the contractor's error will be considered a potential accident, requiring the coverage analysis to proceed further to an examination of the policy's exclusions and other provisions. But if the contractor's error was unintended, how can the error be accidental or non-accidental depending on whose property was damaged? In my opinion, I don't believe that the cases honestly answer this question. Instead, damage to other property has become an erroneous shortcut in determining whether or not the claim alleges a potential accident. This approach is tantamount to providing coverage to the orthopedic surgeon *only* when he or she negligently fails to fix a fracture and *also* causes an infection that spreads to other parts of the body.

I would like you to consider my question while reading *Westfield Ins. Co. v. West Van Buren, LLC*, 2016 IL App (1st) 140862 (July 20, 2016), or the case summary herein by Don Elder and Brett Warning. I think that Justice Pucinski "gets it" when she writes in her dissent:

The Association's second amended complaint also alleges that the water infiltration was caused by "the failure to complete the roofing system under the patio concrete pavers and the failure to coat the top layer of fiberglass with hot asphalt." As a result of that failure, "any water that accumulated over the roof membrane for a long period of time caused water to bleed through the existing roof membrane." I do not read the word "accident" in the policy definition of an occurrence as to exclude failures to perform certain acts. Further, the policy definition of an occurrence explicitly includes "continuous or repeated exposure to substantially the same general harmful conditions," which is what is alleged.

2016 IL App (1st) 140862 ¶34. Illinois courts began holding that construction defects are non-accidental and shortcutting the coverage analysis some twenty-plus years ago. See *Indiana Ins. Co. v. Hydra Corp.*, 245 Ill. App. 3d 926 (2nd Dist. 1993); see also Nyeste, J. "Construction Defect Coverage: Another Court Gets It Wrong," *The Policy* (January 2006). Maybe Justice Pucinski's dissent shows that there is still hope that Illinois courts will someday get it right. In most instances, the result will be the same (due to exclusions or other provisions), but let's at least use the right analysis.