Your CGL Policy May Cover More Than You Think - Damages "because of" Property Damage or Bodily Injury for Construction Projects

By Stella Szantova Giordano[1]

Construction projects are susceptible to injuries and property damage - which is why the stakeholders involved rely heavily on commercial general liability ("CGL") insurance policies when such losses occur. While many insureds are familiar with pursuing insurance coverage for bodily injury and property damage, a CGL policy can also cover certain consequential damages if they can be characterized as damages "because of" property damage or bodily injury.

Imagine the following scenario: An employee falls from scaffolding at the project site. OSHA shuts down the site for investigation of safety issues, and no trades are allowed to return to work for a month. Because of this, the project schedule falls behind, and the owner and the GC suffer extensive delay damages. The question is: can these (and similar) consequential damages be covered as "because of" damages under a CGL policy.

How does "because of" coverage work?

The key language to access the "because of" damages coverage is in the insuring agreement of every CGL policy written on the post-1973 ISO coverage form CG 00 01. Section I.A(1) reads:

> (a) We will pay those sums that the insured becomes legally obligated to pay as **damages because of "bodily injury" or "property damage"** to which this insurance applies.[2]

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[2]CG 00 01 04 13. This language has remained unchanged since 1973.

Because the highlighted phrase can be interpreted very broadly, many courts have concluded that a CGL policy covers certain damages flowing from a bodily injury and property damage if the following is true: 1) there is a bodily injury or property damage for which the CGL policy provides coverage; 2) the sought damages were incurred "because of" such bodily injury or property damage; and 3) the connection between the bodily injury or property damage and the "because of" damages sought is not too attenuated.[3]

As for the third element, any degree of "but for" causation can be construed to provide coverage, since "because of" damages can (and very often are) far broader than property damage or bodily injury itself. Exactly how closely related the losses for which coverage is sought must be related to the underlying bodily injury or property damage will vary from case to case, but a good rule of thumb is the closer related to the underlying bodily injury or property damage, the better.

What types of damages can be covered?

Theoretically, any damages which can be described as damages "because of" bodily injury or property damage could be covered. However, case law on this type of coverage is limited so a creative argument, matching your particular circumstances, may be needed. Courts found "because of" coverage for these types of damages stemming from underlying property damage: 1) delay costs (California, Illinois, Michigan, Texas, Washington and Wisconsin); 2) liquidated damages (Texas and Pennsylvania); and 3) diminution of value (Missouri and Texas).

Delay Costs. If construction is halted and delayed "because of" property damage, associated costs can be very expensive. Examples of covered losses include: a 131-day delay in completion of a California residential project because of water intrusion property damage;[4] and delay costs associated with re-engineering and rip-and-tear damages stemming from a subcontractor's failure to construct concrete piles to their required strength in Washington.[5]

Liquidated Damages. Because liquidated damages are considered to be contract-based, obtaining coverage for them under the "because of" theory can be more difficult. The key distinction is whether the damages are a result of the insured's negligence (in which case they are covered), or whether the damages arise from a contractual obligation (in which case they are not). A federal court applying Texas law allowed coverage for liquidated damages of $5,400 per day resulting from damage to an oil pipeline.[6] A court in Pennsylvania found that liquidated damages "because of" a subcontractor accidentally cutting structural parts of a bridge were covered.[7] Finally, a Tennessee court explained that if the insurers wanted to protect themselves from coverage for liquidated damages as "because of" damages, they could specifically endorse their policies to exclude liquidated damages.[8]

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[3]See *Nucor Corp. v. Emp'rs Ins. Co. of Wausau,* 296 P.3d 74, 80 (Ariz. Ct. App. 2012) (insurer's policies, which obligated insurer to indemnify insured for all sums insured was legally obligated to pay as damages because of property damage, did not require insurer to indemnify insured for the settlement attributed to stigma claims); *Travelers Ins. Co. v. Waltham Indus. Labs. Corp.*, 883 F.2d 1092 (1st Cir. 1989) (applying Massachusetts law) (insurer had no duty to indemnify insured for civil penalties that insured paid to Massachusetts Water Resources Authority for pollution it caused, insofar as amount paid by insured was not "damages" for which insurer was liable); *Travelers Indem. Co. v. State*, 680 P.2d 1255 (Ariz. Ct. App. 1984) (depositors' lost investment in two thrift associations was a "chose in action," and as such was not tangible property within meaning of State's liability policy); *McCollum v. Ins. Co. of N. Am.*, 644 P.2d 283 (Ariz. Ct. App. 1982) (third parties loss of speculative profits from land investment as result of insured's negligent representations was not loss insured against under policy providing coverage for all damages because of injury caused by occurrence); *Great Am. Lloyds Ins. Co. v. Mittlestadt*, 109 S.W.3d 784 (Tex. App. 2003) (economic losses do not constitute "property damage" within the meaning of a general liability policy).

Diminution of Value. In and of itself, diminution in value is a purely economic loss not considered property damage. However, if it stems from underlying property damage, "because of" coverage is available. One court, applying Missouri law, allowed "because of" coverage to a supermarket for diminution in value to its building because of improperly installed and cracking terrazzo floor.[9] Another court in Texas allowed coverage for diminution in value caused by water leakage from developer-made lakes to individual homes.[10]

NOTE: Many states also allow coverage for ensuing damage arising out of defective construction. While some cases characterize this as "because of" coverage, seeking defective construction coverage usually involves a different analysis which is beyond the scope of this article.[11]

Damages "because of" bodily injury may be more limited

Very few cases address coverage for consequential damages "because of" bodily injury on a construction project, but the argument should be the same as with damages flowing from property damage. One notable New York case allowed "because of" damages coverage for a project owner whose employees slipped and fell on water which came from an improperly installed (and leaking) roof.[12] In addition, cases from non-construction settings can be used as guidance when seeking damages "because of" bodily injury. For example, a Maryland case allowed compensatory damages (including purchase of a cell phone head set) to individuals injured by cell phones emitting dangerous levels of radiation.[13] In any case, the argument that damages "because of" bodily injury (such as the delay costs in the hypothetical scenario mentioned earlier) should be covered by a CGL policy is often worth making.

Conclusion

If you find yourself faced with consequential damages on a construction project caused by property damage or bodily injury, you should consider whether the "because of" argument could get you additional recovery under a CGL policy. Coverage counsel can help you evaluate whether damages such as delay in completion, repair costs, liquidated damages or diminution in value could be covered.

For more information, contact Stella Szantova Giordano at ssg@sdvlaw.com.

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[4] *Global Modular, Inc. v. Kadena Pacific, Inc.*, 222 Cal. Rptr. 3d 819 (Cal. Ct. App. 2017), review denied (Dec. 13, 2017).
[5] *Dewitt Const. Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1136 (9th Cir. 2002), as amended on denial of reh'g and reh'g en banc (Dec. 4, 2002).
[6] Ins. Co. of N. Am. v. Aberdeen Ins. Servs., Inc., 253 F.3d 878 (5th Cir. 2001).
[7] Mattiola Const. Corp. v. Commercial Union Ins. Co., No. 1215, 2002 WL 434296 (Pa. Com. Pl. 2002).
[8] *Clark Const. Grp., Inc. v. Eagle Amalgamated Serv., Inc.*, No. 01-2478-DV, 2005 WL 2092998 (W.D. Tenn. Aug. 24, 2005).
[9] *Missouri Terrazzo Co. v. Iowa Nat. Mut. Ins. Co.*, 740 F.2d 647 (8th Cir. 1984).
[10] *Mid-Continent Cas. Co. v. Acad. Dev.*, Inc., 476 F. App'x 316, 319 (5th Cir. 2012) (applying Texas law).
[11] For a 50-state survey on defective construction as an occurrence, click here.
[12] *Charles F. Evans Co. v. Zurich Ins. Co.*, 731 N.E.2d 1109 (N.Y. 2000).
[13] *N. Ins. Co. of New York v. Baltimore Bus. Commc'ns, Inc.*, 68 F. App'x 414 (4th Cir. 2003).