

EXPERT COMMENTARY

BROAD FORM PROPERTY DAMAGE—A LOOK BACK

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Although the term “broad form property damage (BFPD)” has not been used by the Insurance Services Office, Inc. (ISO), since the mid-1980s in connection with the commercial general liability (CGL) policy, BFPD apparently is still very much alive in the “model” insurance provisions of many law firms. Surprisingly, BFPD is often specifically demanded today as part of the required liability insurance of contractors.

Aside from the mildly disturbing fact that the drafters of insurance requirements are “cutting and pasting” wording that is almost 30 years old, the BFPD no longer *separately* exists—it is generally not commercially available by that name.¹

The Conversion

More importantly, calls for BFPD reflect a lack of understanding of what was *automatically* in-

¹A few insurers continue to use the 1973 comprehensive general liability insurance policy forms and endorsements.

cluded in the so-called simplified ISO commercial general liability policy (editions 1985 and later) after its conversion from the ISO comprehensive general liability insurance policy (edition 1973).

Because changes to the comprehensive general liability insurance policy were far-reaching, in both coverage and approach to premium development, in the mid-1980s, ISO distributed a vast number of publications; its effort to inform the insurance industry as well as the public was nothing short of exhaustive. There was simply no shortage of clear, detailed explanations available to explain the “new” CGL policy changes and their anticipated implications.

Historical Development

When viewed in the context of historical development of today’s CGL policy, including various ISO publications, the failure to recognize the breadth of today’s CGL policy is, to say the least, disconcerting.

In 1985, ISO explained very clearly and without equivocation that the following coverages were



provided under the “new” commercial general liability policy:

Both new forms [occurrence and claims-made] contain the essential scope of coverage provided under the old Comprehensive General Liability Insurance (Ed. 1-73) and the Broad Form Comprehensive General Liability Endorsement (GL 04 04 Ed. 5-81) *including* the following coverages:

- Premises/Operations Liability
- Products/Completed Operations
- Contractual Liability
- Personal and Advertising Injury
- Medical Payments
- Fire Damage Legal Liability
- *Broad Form Property Damage*
- Host Liquor Liability
- Incidental Medical Malpractice
- Non-Owned Watercraft
- Limited Worldwide Liability
- Additional Persons Insured
- Extended Bodily Injury
- Automatic Coverage for Newly Acquired Organizations

For details of coverage provided, refer to the forms mentioned above.² [Emphasis added.]

²*Commercial Lines Manual—Division Six—“General Liability Explanatory Memorandum—New Commercial General Liability Policy,”* Copyright, Insurance Services Office, Inc., 1985.

Beyond the Pale

Considering the misunderstandings emanating from today’s CGL policy, to say nothing about the sheer volume of coverage disputes, it would seem that taking into account the express intent of the policy drafters would be good advice. After all, ISO’s drafting and explanation of its policies, while not done in a vacuum, is far more objective than an insurer’s or policyholder’s interpretation and construction of the CGL policy when millions of dollars are at stake in a disputed claim.

While certainly insurers that adopt ISO wording are not bound by ISO’s explanations, resolutely ignoring or simply dismissing ISO’s unambiguous explanations as to the intent of coverage is inexplicable.

An Example—Extended Bodily Injury Coverage

Consider “extended bodily injury coverage,” which has been included in today’s CGL policy. In the 1973 comprehensive general liability insurance policy, the definition of “occurrence” meant an accident and further that the bodily injury or property damage be neither expected nor intended from the standpoint of the insured.

Extended bodily injury coverage, which was part of the “Broad Form Comprehensive Liability Endorsement,” *amended the definition* of “occurrence” by affirmatively stating that an “occurrence” *included* any intentional act by an insured that resulted in bodily injury if the bodily injury arose solely from the use of reasonable force for the purpose of protecting persons or property.

Thus, in determining whether an act is an occurrence or is expected or intended from the standpoint of the insured, the breadth of coverage provided by the extended bodily injury coverage may be overlooked. Yet, ISO was quite

clear in stating that the scope of the “new” CGL policy (1985 edition) included extended bodily injury coverage. It may be worth noting that the ISO CGL’s definition of “occurrence” and the wording of the expected or intended injury exclusion have not changed since the 1985 edition.

BFPD—Limiting the Care, Custody, or Control Exclusion

One of the chief purposes³ of the BFPD wording was to limit or restrict the application of the 1973 comprehensive general liability insurance policy’s exclusion to property damage to property in the insured’s care, custody, or control or property over which the insured was exercising physical control.

Operations Exclusion

The approach taken by ISO in implementing the BFPD endorsement was to limit the property damage exclusion for property in the insured’s care, custody, or control to apply *only* to “that particular part” of property on which work is *being performed* (present tense) or to *unfinished* work that needs to be redone because the work was not done right the first time. Both exclusions apply to property damage *only* during operations—other exclusions applied to property that was within the completed operations hazard.

In today’s ISO CGL policy (editions 1985 and later), exclusions j.(5) and j.(6) reflect the incorporation of a portion of the BFPD limitations as the two exclusions apply only to “that particular part” of certain property.

³The other chief reason for the BFPD endorsement was to limit the exclusion for property damage to work performed by or on behalf of the named insured—to provide the so-called subcontractor exception. The BFPD limited the work performed exclusion to apply only to the work performed by the named insured, removing “on behalf of” to limit the exclusion.

The Typical Example

A painter is burning paint off a house with a torch and accidentally sets fire to entire house. The property damage to the house *is covered*. The exclusion applies only to the portion to which the torch is applied at the time of the fire as this portion is considered excluded as “that particular part.”⁴

The General Contractor

While the interpretations today are mixed, the phrase “that particular part” for the purposes of applying the exclusion has been construed to mean *any portion* of the project that is within the contractual undertaking of the contractor.

For instance, “that particular part” has been applied to all property that is damaged except that which “may exceed the contractor’s contractual duties.” *Transportation Ins. Co. v. Piedmont Constr. Grp. LLC*, 686 S.E.2d 824 (Ga. App. 2009). In other words, property damage to portions of the work that are within the scope of the construction agreement is deemed “that particular part” and thus is excluded. Stated differently, “A common thread deciding whether there is coverage for property damage *is the scope of the insured’s contract [with the property owner].*” *Acuity v. Burd & Smith Constr., Inc.*, 721 N.W.2d 33 (N.D. 2006) [emphasis added].

As the entire project of a general contractor will be within the “scope of the insured’s contract,” interpretations that equate “that particular part” with the scope of work leave general contractors *with virtually no coverage under this portion of the BFPD*. Such coverage positions regarding the breadth of the BFPD were plainly not intended by the policy drafters.

⁴“CIRCULAR – Broad Form Property Damage Coverage Explained,” January 29, 1979, GL-79 12, Insurance Services Office.

BFPD Coverage Explained

In response to requests from insurance companies and insurance agents, ISO published an Explanatory Memorandum on January 29, 1979, to explain the intent of the BFPD endorsement, both as a separate endorsement and as part of the "Broad Form Comprehensive General Liability Endorsement" (GL 04 04 07 76).⁵

As respects the intent of "that particular part," the ISO Explanatory Memorandum maintained:

This paragraph is intended to *precisely* define the extent to which damage to property on which the insured is actually working is excluded. Under the present policy language [1973 Comprehensive General Liability Insurance policy], with respect to general contracting risks, the exclusion relating to property in the care, custody or control of the insured is intended to remove from coverage all property damage caused by the insured in many situations.

Under this care, custody or control exclusion, if the general contractor who is in charge of the project damages a portion of it, the damage is excluded even though that portion may be work being performed by a subcontractor. On the other hand, if a subcontractor damages some portion of the job beyond the scope of operations, the damage would be covered. *The intent under these endorsements [BFPD] is to give the same coverage to both the general and subcontractor for the damage arising out of their own operations and to exclude only damage to the particular property on which the insured is working.* [Emphasis added.]⁶

⁵"CIRCULAR – Broad Form Property Damage Coverage Explained," January 29, 1979, GL-79 12, Insurance Services Office.

⁶"CIRCULAR – Broad Form Property Damage Coverage Explained," January 29, 1979, GL-79 12, Insurance Services Office.

Even with a cursory reading of the above explanation, it is abundantly clear that the policy drafters, in this instance ISO, did not intend "that particular part" to be considered all work within the "scope of the insured's contract." To the contrary, the very reason for using the phrase "that particular part" was to avoid that outcome—under the BFPD, general contractors and subcontractors were to be *provided the same coverage*—the exclusion applied only to the property on which the general contractor or subcontractor was actually working.

According to the drafters, "The exclusion is intended to apply only to the part of the property on which the operations are being performed. In this context, 'property' is intended to mean any unit of property which can become the subject of liability."⁷ [Underlined in the original.] To help understand how this section of the BFPD applies, ISO offers numerous short examples, including this one that is often cited (and, seemingly, just as often ignored):

The following examples illustrate the intent of exclusion (2)(d):

A general contractor engages a steel erection contractor to erect steel beams for a building. After erecting several beams, the subcontractor negligently swings another beam against the erected beams causing damage to all the beams. The damage to the beams already in place would be covered. The damage to the swinging beams would be excluded under 2(d)(i) [that particular part of any property ... upon which operations are being performed by or on behalf of the insured].

In the above illustration, each beam is the "unit of property" or "that particular part" of property. What is excluded is "that particular part" of the property that *is being worked upon*—the exclusion only applies to property damage to the

⁷"CIRCULAR – Broad Form Property Damage Coverage Explained," January 29, 1979, GL-79 12, Insurance Services Office.

swinging beam (as that is the only “unit” upon which operations are actually being performed). The beams already in place are clearly within the scope of work of both the general contractor and the subcontractor. Yet, the policy drafters, ISO, unequivocally state that the *property damage to the erected beams* is covered by virtue of the BFPD endorsement.

Conclusion

ISO’s express intent as to this section of the BFPD has been followed in some instances. Take for example the Sixth Circuit applying Ohio law:

The opening words of the exclusion—namely, “[t]hat particular part”—are trebly restrictive, straining to the point of awkwardness to make clear that the exclusion applies only to building parts on which defective work was performed, and not to the building generally. And we also agree that “part,” as used in this exclusion, means the “distinct component parts” of a building—things like the “interior drywall, stud framing, electrical wiring,” or, as here, the foundation. *Fortney & Weygandt, Inc. v. American Manufacturers Mut. Ins. Co.*, 595 F.3d 308, 311 (6th Cir. 2010) (applying Ohio law).

Similarly, at least one commentator (Scott C. Turner in *Insurance Coverage of Construction Disputes* § 32:5 (2011)) recognizes this intent: “The use of the word ‘particular’ suggests that the exclusion only applies to the smallest unit or division of the work in question.”

As noted above, while insurers are certainly not required to abide by the drafter’s (ISO’s) explanations or interpretations, it would seem that questions regarding *the intent of the parties* should take into account such explanations and illustrations. ISO published its Explanatory Memorandum in the first instance, according to the Memorandum, in response to questions by the insurers as well as insurance agents and broker because of the difficulty in understanding the BFPD. Put differently, it is indeed a challenge to reconcile an insurer’s asserted “intent” of the “that particular part” policy wording if the insurer readily dismisses the drafter’s express intent.

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