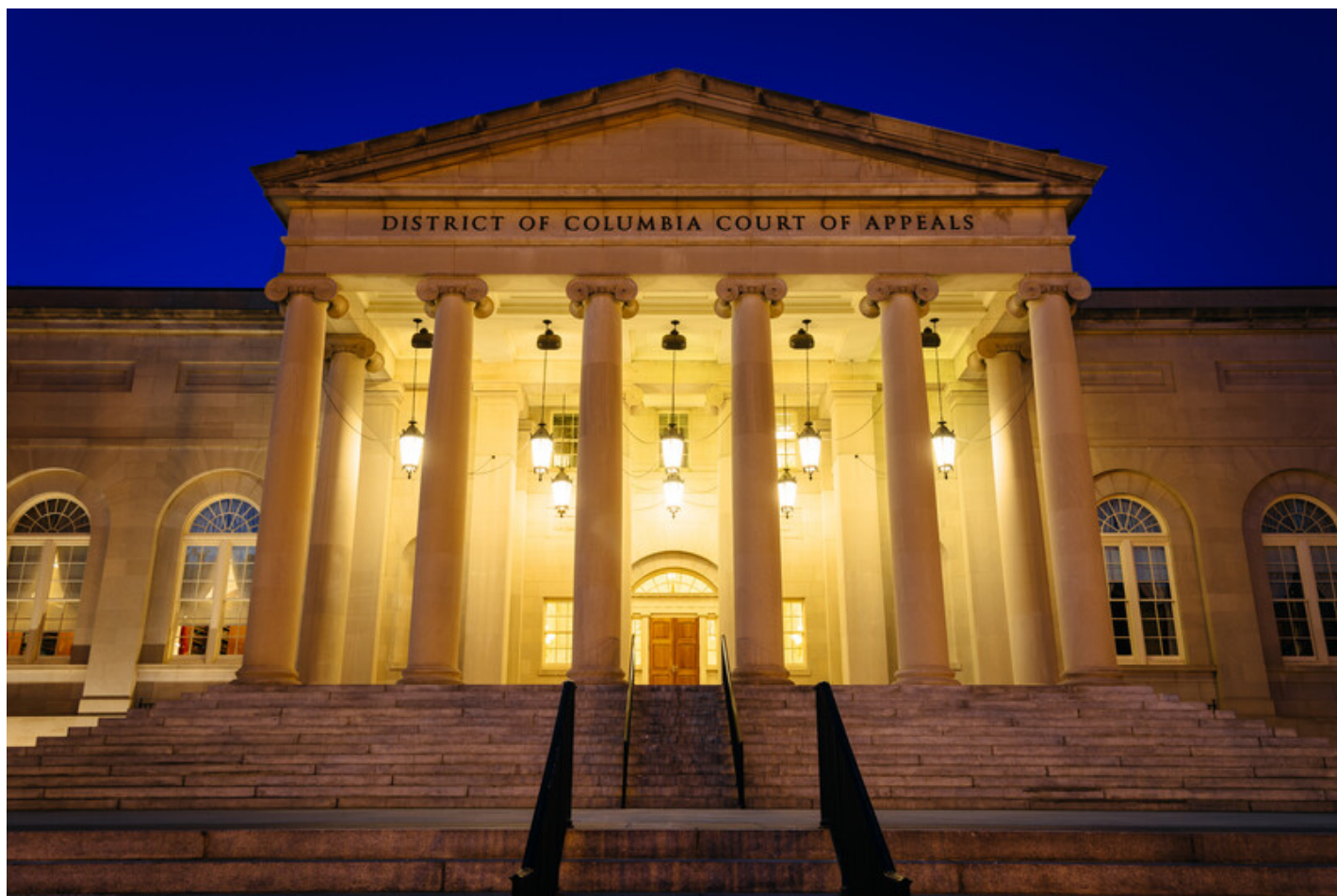




Expert Commentary

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More Confusion Regarding the "Damage to Property" Exclusion



The 10th Circuit Court of Appeals recently weighed in on the debate over the meaning of the phrase "that particular part" in the "damage to property" exclusion in standard commercial general liability (CGL) policies. Despite the seeming precision of the phrase, the court found that it was ambiguous.

One of the so-called business risk exclusions, the "damage to property" exclusion, narrows coverage for certain types of property damage claims. A principal source of disagreement among courts has been the words "that particular part," which is found in paragraphs j(5) and j(6) of the exclusion.

j. Damage To Property

"Property damage" to:

...

(5) *That particular part* of any 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.

A September 2013 IRMI Expert Commentary article by Craig Stanovich, "Broad Form Property Damage—A Look Back," recounts the drafting history of the phrase "that particular part" in the damage to property exclusion. The phrase originally was included in a separate broad form property damage endorsement and was intended to limit the scope of the exclusion in pre-1985 general liability policies for property damage to property in the insured's care, custody, or control.

The 1985 edition of the standard Insurance Services Office, Inc. (ISO), CGL policy incorporated the phrase into the damage to property exclusion, where it has remained since. According to Mr. Stanovich, ISO's explanation of that language, expressed in a 1979 memorandum titled "Broad Form Property Damage Coverage Explained," made clear that the addition of the words "that particular part" was intended to "*precisely define the extent to which damage to property on which the insured is actually working is excluded.... The intent ... [is] to exclude only damage to the particular property on which the insured is working.*"¹

Thus, the intent of adding the phrase to j(5) and j(6) of the damage to property exclusion was to exclude only damage to the *specific unit of property* on which the insured was *actually working*, or which must be restored, repaired, or replaced because the insured's *actual work on it* was incorrectly performed.

Prior Court Decisions

On its face, the phrase does not seem particularly confusing. In practice, however, courts have adopted three different views of what it means.

Some courts, consistent with the drafting history of the exclusion, have recognized that the phrase "that particular part" is limiting and narrows the scope of the exclusion to bar coverage only for property damage to those specific portions of a project on which the insured was actually performing defective work. *See, e.g., Fortney & Weygandt, Inc. v. American Mfrs. Mut. Ins. Co.*, 595 F.3d 308, 311 (6th Cir. 2010) (the words "that 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").

The court in *Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, 538 F.3d 365 (5th Cir. 2008), reached a similar conclusion. Considering the insurer's argument for a broad construction of exclusion j(6), the court found that, "[the insurer's] reading of the exclusion reads out the words 'that particular part.' If work on any part of a property would leave an insured exposed for damages to the entire property, the exclusion should state: 'Property damage to property that must be restored, repaired or replaced because your work was incorrectly performed on any part of it.'" *Id.* at 372; *see also, Mid-Continent Cas. Co. v. JHP Dev., Inc.*, 557 F.3d 207 (5th Cir. 2009) ("The plain meaning of the exclusion ... is that property damage only to parts of the property that were themselves the subjects of the defective work is excluded.... The narrowing 'that particular part' language is used to distinguish the damaged property that was itself the subject of the defective work from other damaged property that was either the subject of nondefective work by the insured or that was not worked on by the insured at all.").

On the other hand, a number of courts have construed the exclusion broadly to mean that there is no coverage for damage to any part of a project that is within the scope of an insured's work, even if the insured's defective work related only to a particular portion of the project. In *Lafayette Ins. Co. v. Peerboom*, 813 F. Supp. 2d 823 (S.D. Miss. 2011), the insured had been hired to excavate beneath the home, install hydraulic jacks at various locations below the foundation, and raise the structure up several feet. During this operation, the house fell, causing damage to the entire structure.

The court held that the damage to property exclusion barred coverage for damage to the entire home. While the court noted that other courts had narrowly construed the exclusion as barring coverage only for certain portions of a structure damaged during construction operations, it found that, in this case, the insured's work consisted of raising the elevation of the entire home and, therefore, "that particular part" of the home on which the insured was working, was the entire home. In reaching this conclusion, the *Lafayette* court noted that the purpose of the business risk exclusions generally is to exclude coverage for an insured's faulty workmanship.

Similar results were reached in other cases. *See, e.g., Jet Line Servs., Inc. v. Am. Empls. Ins. Co.*, 404 Mass. 706 (Mass. 1989) (damage to entire storage tank excluded); *American Equity Ins. Co. v. Van Ginhoven*, 788 So.2d 388 (Fla. App. 2001) (damage to entire pool excluded); *Vinsant Elec. Contractors v. Aetna Cas. & Surety Co.*, 530

S.W.2d 76 (Tenn. 1975) (holding damage to entire switchboard excluded and stating "[w]e cannot so construe this provision as to limit the exclusion to the precise and isolated spot upon which work was being done").

Other courts considering the exclusion have held that it is ambiguous, finding both constructions reasonable. In *Roaring Lion LLC v. Nautilus Ins. Co.*, 2011 U.S. Dist. LEXIS 100666 (D. Mont. July 15, 2011), the insured had been hired to build a cabin, and one of its subcontractors incorrectly poured the foundation of the cabin, which caused significant damage to the entire structure, including the collapse of the framing. The insurer argued that the damage to property exclusion barred coverage for all damage to the cabin, and the insured argued that the exclusion barred coverage only for the damage to the foundation. The court noted that the insurer's argument "overlooks the exclusions' opening reference to 'that particular part,'" yet held that, in the absence of a definition of that phrase, it could be read broadly to encompass the entire cabin, or narrowly to encompass only the foundation. As a result, the court found the exclusion ambiguous and construed it strictly against the insurer.

The 10th Circuit Weighs in

The 10th Circuit leaped into the fray over the meaning of the exclusion in a recent decision in *MTI, Inc. v. Employers Ins. Co. of Wausau*, 913 F.3d 1245 (10th Cir. 2019). In that case, the insured had been hired to repair corroded anchor bolts in a cooling tower—a large wooden structure that was attached to a foundation using anchor bolts. After the insured had removed all of the corroded bolts, but before it had installed the new bolts, the tower was struck by high winds, causing several structural components to break, requiring the entire tower to be replaced. The insurer denied coverage for the claim, arguing that the cost of replacing the cooling tower was excluded under the damage to property exclusion. The district court, applying Oklahoma law, held that the claim was excluded under both j(5) and j(6) of the exclusion.

On appeal, the 10th Circuit Court of Appeals reversed. Noting that the exclusion has "received inconsistent treatment from a number of other state and federal courts," the 10th Circuit found that the exclusion was ambiguous because it was susceptible to the following two reasonable interpretations.

[I]t is the responsibility of the insurer desiring to limit liability to employ clear language. Wausau has failed to do so in this case. The phrase "that particular part" could be read to refer solely to the direct object on which the insured was operating. Alternatively, it could apply to those parts of the project directly impacted by the insured party's work. We agree with those courts that have held the former interpretation is a reasonable one, although we acknowledge that the latter is also reasonable.

Having found the exclusion ambiguous, the court applied the doctrine of *contra proferentem* and construed it in favor of the insured, holding that it applied only to the anchor bolts, not the entire tower.

In finding the exclusion ambiguous, the court recognized that the phrase "that particular part" was "narrowing language" and, as a result, found reasonable the insured's interpretation that the exclusion applied only to the anchor bolts on which the insured was working. Despite the narrowing nature of the words, the court also found reasonable the insurer's interpretation that the exclusion applied to the entire structure. In so finding, however, the court did not reference any particular language in the exclusion supporting that position. Rather, the court simply noted that other courts had found the exclusion to apply to "those parts of the project directly impacted by the insured's work."

In particular, the 10th Circuit relied on two decisions to support its finding that a broad construction of the exclusion was reasonable. In the first, *William Crawford, Inc. v. Travelers Ins. Co.*, 838 F. Supp. 157 (S.D.N.Y. 1993), the court considered the exclusion as it applied to property damage to a 7,000 square foot apartment that the insured had been hired to renovate. After discovering that some of the plaster walls were not drying properly, the insured placed a number of electric fans in the apartment to help resolve the issue. One of the fans ignited, causing a fire, which caused fire damage to the entrance area and smoke damage to other parts of the apartment.

The court rejected the argument that the exclusion applied only to the portion of the apartment where the insured was performing work at the time of the fire and found that all of the property damage was excluded. In so holding, the court did not attempt to explain how the phrase "that particular part" could be given effect if the exclusion barred coverage for damage to the entire property; instead, the court merely cited other courts that had rejected a narrower reading of the exclusion and noted that the insured had not proffered any contrary authority.

The second case relied on by the 10th Circuit, *Jet Line Services, Inc. v. American Employers Ins. Co.*, 404 Mass. 706 (Mass. 1989), addressed coverage for damage to a petroleum storage tank that exploded while the insured was cleaning it. The exclusion at issue in that case barred coverage for damage "to that particular part of any property ... upon which operations are being performed [by the insured] at the time of the property damage arising out of such operations." The insured argued that the exclusion applied only to the bottom of the tank where it was performing cleaning operations at the time of the explosion.

The court rejected the insured's argument, holding that damage to the entire tank was excluded because, in the court's view, the phrase "that particular part of any property ... upon which operations are being performed" referred to the entire tank because the insured was hired to clean the entire tank. The court does not reconcile this holding with the fact that the insured was actually performing operations on only a portion of the tank at the time of the explosion. This raises the question of what meaning does "that particular part" have if the exclusion bars coverage for all damage to property within the insured's scope of work.

Rather than answering this question, the court simply relied on decisions from other courts where the exclusion was construed broadly and concludes that "[w]here, as here, the insured was retained to perform work on an entire unit of property, and not just a portion of it, the applicability of the exclusion to damage to

the entire unit is even more apparent than in cases in which the insured was retained to work on only a part of the unit."

Although the 10th Circuit in *MTI, Inc.*, acknowledges that the phrase "that particular part" must have a meaning and that other courts have recognized that it is limiting in nature, it nonetheless credits as reasonable the conclusion of other courts that interpreted the exclusion broadly. The broad construction of the exclusion, however, does not appear to ascribe any meaning at all to the words "that particular part." Indeed, if those words were omitted, such that the exclusion barred coverage for "property damage to any real property on which you ... are performing operations" and "property damage to any property that must be restored, repaired, or replaced because 'your work' was incorrectly performed on it," would the scope of the exclusion be any different than how the courts in *William Crawford, Inc.*, and *Jet Line Services, Inc.*, construed it? Neither the 10th Circuit, nor the courts on which it relied, attempt to answer this question.

As a result, the latest circuit court decision to weigh in on the meaning of the "that particular part" does little to help clear up the confusion surrounding the "damage to property" exclusion.

¹ Craig F. Stanovich, "Broad Form Property Damage—A Look Back," IRMI, September 2013, emphasis in original, *citing* "CIRCULAR – Broad Form Property Damage Coverage Explained," ISO, GL-79 12, January 29, 1979.

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