



2019 Construction Conference
September 25 - 27, 2019
San Diego, CA

Pesky Manuscript Endorsements and Their Impact on the Availability of Coverage

I. Problematic Manuscript Endorsements & Exclusions

A. The Designated Work Exclusion

1. Description of Endorsement

The Designated Work Exclusion is designed to exclude specific types of work from coverage. Here is an example of a "fill in the blank" version of the endorsement:

EXCLUSION - DESIGNATED WORK

This endorsement modified insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
SCHEDULE

Description of your work: _____

(if no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

This insurance does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" and arising out of "your work" shown in the Schedule.

2. Applicable Caselaw

A Designated Work exclusion was construed in *Gemini Ins. Co. v. N. Am. Capacity Ins. Co.*, No. 3:14-CV-00121-LRH, 2015 WL 506720, at *1 (D. Nev. Feb. 6, 2015). Although that decision was ultimately vacated as part of a settlement, *see* No. 3:14-CV-00121-LRH, 2015 WL 3891423 (D. Nev. June 18, 2015), it illustrates the types of issues that arise when the exclusion is litigated.

Gemini sued North American to recover part of the cost of defending their mutual insured, Olsen Construction Company, against construction defect claims. North American argued that there was no possibility of coverage under its policy, which contained a Designated Work exclusion that precluded coverage for Olsen's own work, which was defined as "(1) new construction of residential units, (2) remodeling or conversion of an existing apartment, or (3) operations conducted by [Olsen] or on [Olsen's] behalf for residential homeowners associations." Ultimately, the Court found that the Designated Work exclusion was "as a whole" ambiguous "with respect to the dates for which it applies." *Id.* at __. "[I]f, for example, the exclusion only applies to Olsen's work performed during the policy

period [2005 to 2006], then it does not exclude coverage for Olsen's work between 2002 and 2003, which could have resulted in property damage during the policy period." *Id.* The court went on to consider the applicability of a "Pre-existing Damage" exclusion, another type of pesky manuscript endorsements that limits coverage for construction defects.

Another manuscript Designated Work exclusion was considered in *Bridgetown Condo. Homeowner's Ass'n v. Ford Dev., Inc.*, No. 08-195-BR, 2009 WL 1743759 (D. Or. June 18, 2009). The endorsement in that case precluded coverage for property damage arising out of or resulting from the policyholder's own work, which was defined as "(1) Any of the following: A. Condominiums, multi-unit homes, townhouses, or apartment buildings which contain 5 or more single family units. B. Any building or structure in excess of three (3) stories or any building or structure in excess of forty (4) feet in height." *Id.* at *3. The parties battled over the meaning of the undefined term "condominium" in ¶ 1.A of the endorsement, and whether the language of ¶ 1B could be fairly read to apply to the single-dwelling units built by the project at issue. Ultimately, however, the Court found in favor of the insurer based on a "plain meaning" construction of the word "condominium." *Id.* at *6-7.

B. Other Insurance Amendatory Endorsement or Excess Clause in Additional Insured Endorsement

1. Versions of Endorsements/Excess Provisions

The Other Insurance/Excess endorsements are designed to make insurance afforded under the policy to any entity who qualifies as an additional insured apply as Excess to any other insurance that may be available to that additional insured. "Other Insurance" clauses are intended to limit an insurer's liability when there is other insurance available to cover the same loss. Sometimes, the other insurance clauses provide for either the complete relief or escape of the instant policy, or the instant policy to be excess to any other policy or policies. This excess-type provision attempts to relieve the issuing insurer of liability unless and until the primary insurance coverage is exhausted. § 5:7. Other insurance clause, Insurance Coverage of Construction Disputes § 5:7 (2d ed.). However, conflicting other insurance clauses can create litigation among insurers. Here is version of one of those endorsements:

This endorsement modified insurance provided under the following:

AMENDMENT - OTHER INSURANCE CONDITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Paragraph **4. Other Insurance** Condition is replaced by the following:

4. Other Insurance

This insurance is excess over any other insurance, whether primary, excess, contingent or on any other basis, except when purchased specifically to apply in excess of this insurance.

If this insurance is excess, we will have no duty under this Coverage Part to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

If this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for damages in the absence of this insurance;
- (2) The total of all deductible and self-insured amounts under all that other insurance.

Here's an additional example in the additional insured context:

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

PULTE HOMES INC

1. **WHO IS AN INSURED (Section II)** is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability caused, in whole or in part, by your performance of "your work" for that insured.
2. With respect to 1. above the following additional provisions apply:
 4. **Other Insurance**

The insurance afforded by this Coverage Part is primary insurance and we will not seek contribution from any other insurance available to the insured unless the other insurance is provided by a contractor other than the above named additional insured. We shall be considered as excess insurance of any other insurance provided by a contractor other than the above named additional insured.

This amendment applies only when you have agreed by written "insured contract" to designate the person or organization listed above as an additional insured subject to all provisions and limitations of this policy.

2. Decisions Interpreting the Applicability of these types of Endorsements

One common way courts resolve this is by stating that "where two insurance policies cover the same occurrence and both contain excess other insurance clauses, the excess insurance provisions are mutually repugnant and both policies will be treated as primary." *Certain Underwriters at Lloyds v. Waveblast Watersports, Inc.*, 80 F. Supp. 3d 1311, 1320 (S.D. Fla. 2015); *Keenan Hopkins Schmidt and Stowell Contractors, Inc. v. Continental Cas. Co.*, 653 F. Supp. 2d 1255 (M.D. Fla. 2009).

Some courts, however, look to public policy to decide the "other insurance" issue rather than to whether the policies have mutually repugnant language that may or may not cancel out. An example of such a case is found in *Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co.*, 246 Cal. App. 4th 418, 200 Cal. Rptr. 3d 786 (2016), as modified on denial of reh'g (May 10, 2016). In *Arch*, a group of homeowners in a development project sued the general contractor for defective construction and the general contractor then filed a third party complaint against one of the subcontractors it used on the development project. *Id.* at 425. The subcontractor then tendered the defense of the claim to two insurers who issued commercial general liability policies to the subcontractor covering different time periods. *Id.* One insurer, Lloyds, agreed to defend the subcontractor and the other insurer, Arch, denied a defense obligation because an "other insurance" clause in its policy. *Id.* The clause stated that the insurer has the right and duty to defend "provided that no other insurance affording a defense against such a suit is available" to the insured. *Id.* at 426. The case ultimately settled, with both Arch and Lloyds contributing to the indemnification costs. Lloyds then filed an action against Arch for contribution towards the defense costs. *Id.* The trial court ruled in favor of Arch, relying on a previous California opinion holding that when other insurance provision is placed in both the coverage and conditions section of a policy, it is valid and enforceable. *Id.* at 427. However, the appellate court noted that this opinion predated the "modern trend" to require equitable contributions on a pro rata basis from all primary insurers regardless of the type of "other insurance" clause is in the policies. *Id.* at 429. The appellate court then noted how public policy disfavored escape clauses whereby coverage purports to disappear in the presence of other insurance and how giving 'excess other insurance' clauses in a

primary policy priority over other primary policies “is completely unrelated to the original historical purpose of such ‘other insurance’ clauses, which was to prevent multiple recoveries by insureds in cases of overlapping insurance policies providing coverage for the same loss.” *Id.* at 437. Thus, the court ruled that Arch’s “other insurance” clauses were unenforceable. *Id.*

C. Residential/Townhome/Condominium Construction Exclusion

1. Examples of Exclusions

Residential construction exclusions are designed to remove or eliminate coverage with respect to operations in connection with property intended for habitation. Some of these endorsements apply only to multifamily housing, such as apartments, townhomes, and condominiums. The scope of these exclusions can vary significantly based on the type of construction work to which they apply. The inclusion of a residential construction exclusion on a subcontractor's policy would arguably also eliminate any coverage that the general contractor may have as an additional insured on that policy. Examples of residential construction exclusions include Multi-Unit Construction Project Exclusion Projects Exceeding 10 Residential Units ("Multi-Unit Construction Project Exclusion"), Exclusion-Residential Premises (Exception for Ongoing Operations), Form HS 21 33 10 14, and Exclusion-Residential Premises, Form HS 21 38 10 14.

2. Applicable Caselaw

The Multi-Unit Construction Project Exclusion Projects Exceeding 10 Residential Units is currently the subject of litigation in Florida state court. No other court has addressed this particular exclusion, nor have Florida courts addressed the applicability of this exclusion. The exclusions Exclusion-Residential Premises (Except for Ongoing Operations) and Exclusion-Residential Premises have not been the subject of litigation. Courts in various jurisdictions, including but not limited to Washington and Texas have enforced residential exclusions similar to the Multi-Unit Construction Project Exclusion. *See, e.g., Hay v. Am. Safety Indem. Co.*, 270 F. Supp.3d 1252, 1258 (W.D. Wash. 2017) (holding that based on the clear language of the policy, it is clear that the exclusion applies, as the insured constructed 29 homes, which is over the 25 house limit in the exclusion) and *Broughton v. Castle Nat'l Ins. Co.*, 656 Fed.Appx. 729, 734 (5th Cir. 2016) (applying Texas law and holding that the house tract exclusion barred coverage because the insured built five residential buildings and the policy expressly precluded coverage when the insured built five or more residential buildings).

Courts in several jurisdictions have enforced exclusions for residential premises similar to the Exclusion-Residential Premises (Except for Ongoing Operations) and Exclusion-Residential Premises. *See, e.g., First Mercury Ins. Co. v. Waterside Condominium Ass'n*, 2013 WL 6383883 (holding that Exclusion-Residential Construction Work excluded coverage for all "residential construction work") and *RSUI Indem. Co. v. RCG Group (USA), et al.*, 890 F.Supp.2d 315 (2012) (*affirmed on appeal*) and *First Mercury Ins. Co. v. Waterside Condominium Ass'n*, 2013 WL 6383883 (holding that the exclusion for "your work" on any "residential project" applied because the building at issue was clearly "mixed use" as defined in the exclusion).

D. Stucco Exclusions

1. Examples of Exclusions

This exclusion is relatively new to the market and a play on the more well-known Exterior Insulation and Finish Systems (“EIFS”) exclusion. The standard ISO EIFS endorsement, form CG 21 86 12 04, reads as follows:

A. This insurance does not apply to “bodily injury,” “property damage” or “personal and advertising injury” arising out of, caused by, or attributable to, whether in whole or in part, the following:

1. The design, manufacture, construction, fabrication, preparation, distribution and sale, installation, application, maintenance or repair, including remodeling, service, correction or replacement, of any “exterior insulation and finish system” or any part thereof, or any substantially similar system or any part thereof, including the application or use of conditioners, primers, accessories, flashings, coatings, caulking or sealants in connection with such a system; or

2. “Your product” or “your work” with respect to any exterior component, fixture or feature of any structure if an “exterior insulation and finish system,” or any substantially similar system, is used on the part of that structure containing that component, fixture or feature.

B. The following definition is added to the Definitions Section:

“Exterior insulation and finish system” means a non-load bearing exterior cladding or finish system, and all component parts therein, used on any part of any structure, and consisting of:

1. A rigid or semi-rigid insulation board made of expanded polystyrene and other materials;
2. The adhesive and/or mechanical fasteners used to attach the insulation board to the substrate;
3. A reinforced or unreinforced base coat;
4. A finish coat providing surface texture to which color may be added; and
5. Any flashing, caulking or sealant used with the system for any purpose.

Note that the foregoing attempts to eliminate coverage in regards to liability arising out of the insured's work on “with respect to any exterior component, fixture, or feature of any structure” if an EIFS is included there, whether or not the liability is related to the EIFS or whether or not the insured installed the EIFS. § 41F:1. EIFS Exclusion in general, Insurance Coverage of Construction Disputes § 41F:1 (2d ed.). Certain insurers have attempted to expand the standard EIFS exclusion to include traditional stucco products as well. An example is as follows:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXTERIOR FINISHING SYSTEM AND STUCCO EXCLUSION - FORM A

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Under SECTION I - COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions and COVERAGE B. PERSONAL INJURY AND ADVERTISING INJURY LIABILITY, 2. Exclusions, the following exclusion is added:

Exterior Finishing System and Stucco

This insurance does not apply to any claim, "suit", action or proceeding for "bodily injury", "property damage", "personal injury" or "advertising injury" which is in any way related to or arising out of any "exterior finishing system" or exterior "stucco" application.

This exclusion does not apply to any claim, "suit", action or proceeding for "bodily injury" which occurs before completion of "your work".

"Your work" is deemed completed:

1. When all of the work called for in your contract has been completed.
2. When all of the work to be done at the site has been completed if your contract calls for work at more than one site.

3. When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

B. The following definitions are added to SECTION V - DEFINITIONS:

"Exterior finishing system", is an exterior insulating and finishing system applied to the exterior of a structure which incorporates any synthetic stucco or material similar in substance or purpose, and which may also include: insulating board or other material; adhesive or mechanical fasteners; and the application of flashings, coatings, caulking or sealants.

"Stucco", is a material made of portland cement, sand, cement, lime, and/or plaster, or any combination thereof, applied as a hard covering for exterior walls.

2. Decisions Interpreting the Applicability of Stucco Exclusions

Many courts have found that the well-known EIFS exclusion does not apply to relieve an insurer of its duty to defend where the allegations against the insured included allegations of the insured using traditional stucco products as well as EIFS. *Insurance Corp. of Hannover v. Skanska USA Bldg., Inc.*, 2008 WL 2704654 (S.D. Tex. 2008).

Most recently, in *Southern Owners Ins. Co. v. Gallo Building Services, Inc.*, No. 815CV01440EAKAAS; 2018 WL 6619987 (M.D. Fla. December 18, 2018), a Florida District Court interpreted the exclusion which purports to exclude traditional stucco. In *Gallo*, Southern Owners issued a series of commercial general liability and umbrella policies to Gallo as the named insured, who served as a subcontractor to KB Home-Tampa, LLC and related entities (hereinafter "KB") on a project known as the Willowbrook Condominiums. *Id.* at *1-*2. The Policies contained the identical Stucco Exclusion as the manuscript endorsement, above. *Id.* at *2. After turnover, the condominium association sent a notice of construction defects pursuant to Fla. Stat. §558 to KB and KB elected to investigate and repair the defective work and resulting property damage, incurring significant costs in doing so. *Id.* at *3. Accordingly, KB filed suit against all of its subcontractors, including Gallo seeking recovery of the amounts it expended to repair the project. *Id.* Specifically, KB alleged "the work of the subcontractors was 'deficient within, and without limitation, the following systems: Substitutions in the size of the Hurri-Bolt system; Wall panel connections; Wall panel, balcony column and balcony deck strapping; Deck waterproofing; House wrap and flashings at rough openings and windows; Sealants at perimeter edge of windows and SGDs; Stucco is not installed in accordance with the requirements outlined on the Design Documents, fail to comply with ASTM C926, C1063 and applicable requirements.'" *Id.* KB's suit alleged that Gallo performed concrete and wood framing work on buildings 15 and 20-45; house wrap work on buildings 20-23 and 33-39; and exterior stucco work on buildings 20-23 and 33-45. *Id.* at *7.

Southern Owners asserted that it had no duty to defend its named insured, Gallo, because the allegations in the underlying complaint fell within the Stucco Exclusion. *Id.* at *7. Southern Owners asserted that Gallo’s scope of work was entirely limited to the exterior of the project, including the use of an exterior finishing system and stucco; thus, coverage was barred. *Id.* Importantly, Southern Owners relied on a multitude of decisions interpreting an “Exterior Insulation and Finish Systems” (“EIFS”) exclusion, in which courts upheld the exclusion, which the Middle District declined to apply because, in each of those cases, the parties did not contest that EIFS system was used. *Id.* On the other hand, KB argued that Gallo performed multiple scopes of work unrelated to stucco or an exterior finishing system and that the underlying complaint contains allegations entirely unrelated to the application of either exterior, relying on the allegations related to housewrap and framing work. *Id.* The court held that it “cannot determine that each allegation against Gallo in the Underlying Complaint relates to or arises out of the installation of stucco or EIFS,” and accordingly, determined that Southern Owners’ duty to defend its named insured was not barred by the Stucco Exclusion. *Id.* at *8.

E. Subcontractor Warranty Endorsements

1. Examples of Versions of Endorsements

Some insurers include in their CGL policies a nonstandard endorsement requiring general contractor insureds to warrant that all subcontractors used will hold the insured harmless from any liability arising out of the subcontractor's work and will maintain certain specified minimum levels of liability insurance coverage. One such provision reads as follows:

As a condition precedent to this policy applying to any claim in whole or in part based upon the work performed by independent contractors, the insured must have prior to the date of the loss giving rise to the claim:

1) received a written indemnity agreement from the independent contractor holding the insured harmless for all liabilities, including costs of defense, arising from the work of the independent contractor; and

2) obtained certificates of insurance from the independent contractor indicating that the insured is named as an additional insured and that coverage is maintained equal to or greater than provided by this policy with limits of at least \$1,000,000 per occurrence.

Some of these provisions affect the premium charged the insured if it does not comply with this provision, while others actually purport to exclude coverage if the general contractor does not comply.

2. Case Law Interpreting Endorsements

Several courts have upheld these provisions. *Benchmark Insurance Co. v. Dismon Corp.*, 262 F. Supp. 3d 991 (C.D. Cal. 2017); *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.*, 177 Cal. App. 4th 272, 99 Cal. Rptr. 3d 225 (2d Dist. 2009); *Scottsdale Ins. Co. v. Essex Ins. Co.*, 98 Cal. App. 4th 86, 119 Cal. Rptr. 2d 62 (4th Dist. 2002); *Essex Ins. Co. v. New Jersey Pan African Chamber of Commerce & Industry, Inc.*, 2013 WL 4515934 (N.J. Super. Ct. App. Div. 2013). *But see Greystone Const., Inc. v. National Fire & Marine Ins. Co.*, 2013 WL 1324600, *4–5 (D. Colo. 2013). Nevertheless, under one theory or another, most states do not allow an insurer to escape its obligations under a policy in response to an insured's breach of a condition like this unless the insurer has been substantially prejudiced by that breach. *E.g., Evanston Ins. Co. v. American Safety Indem. Co.*, 768 F. Supp. 2d 1004, 1010–12 (N.D. Cal. 2011); *Scottsdale Ins. Co. v. Essex Ins. Co.*, 98 Cal. App. 4th 86, 119 Cal. Rptr. 2d 62 (4th Dist. 2002). Thus, to preclude coverage it must be that the insurer's position was substantially prejudiced by the insured's failure to require the specified coverage of its subcontractor in the year the policy is in effect.

That being the case, this endorsement is not as much of a threat to coverage as it might first appear. § 41:1.Warranty of Subcontractor Coverage Exclusion/Endorsement in general, Insurance Coverage of Construction Disputes § 41:1 (2d ed.) Most construction-related claims involve defects in the insured's work that cause property damage one or more years after the insured performed its work. *Id.* In these situations, the insured's failure to require the specified coverage of the subcontractors it is currently using in the policy year of the property damage does not usually prejudice the insurer's interests. *Id.* First, the insured is generally using different subcontractors in the year of the property damage than the insured used in the earlier year when the work was performed. *Id.* Therefore, whether or not the current subcontractors have the requisite coverage has no effect on the claim regarding past work performed by different subcontractors. *Id.* Second, even if the current subcontractors are the same as those who performed the work in the past, the required coverage often does not affect completed operations claims, because many subcontractors are unable to obtain completed operations coverage under today's market conditions. *Id.* So, even if the subcontractors had obtained the specified coverage, it would not have helped the general contractor's insurer. *Id.*

Where the claims against an insured general contractor are for its own wrongdoing, rather than for its vicarious liability from its subcontractors' work, there is no prejudice to the insurer if the insured fails to comply with the endorsement's requirements, so the exclusion should not apply. *Schmitt v. NIC Ins. Co.*, 2007 WL 3232445 (N.D. Cal. 2007) (not officially published). One case has held that the ISO exclusion is ambiguous, because "in whole or in part" could modify either the word "work" or the word "claim," unless there was persuasive evidence that the insured would believe that the phrase only referred to the word "claim." *Benchmark Insurance Co. v. Dismon Corp.*, 262 F. Supp. 3d 991 (C.D. Cal. 2017). In states applying the eight corners test for the duty to defend, the failure of the complaint against the insured to allege the insured's compliance with all the conditions in the exclusion prevents the exclusion to being a bar to defense coverage. *E.g., Cincinnati Specialty Underwriters Insurance Company v. Millionis Construction, Inc.*, 2018 WL 3076732 (E.D. Wash. 2018).

F. Exclusion for Products Completed Operations Hazard

1. Example of Exclusion

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – PRODUCTS-COMPLETED OPERATIONS HAZARD

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

This insurance does not apply to "bodily injury" or "property damage" included within the "products-completed operations hazard".

Certainly, the definition of "Products-Completed Operations Hazard" becomes relevant when interpreting the foregoing

16. "Products-completed operations hazard":
- a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
 - (1) Products that are still in your physical possession; or
 - (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
 - b. Does not include "bodily injury" or "property damage" arising out of:
 - (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
 - (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
 - (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

2. Cases Interpreting the Exclusion

Several exclusions included within the standard CGL policy are tied directly to the products-completed operations hazard. For example, property damage exclusion j.(6), which eliminates coverage for the cost of repairing or replacing the named insured's defective work, does not apply to property damage that is included within the products-completed operations hazard. Exclusion l. eliminates coverage for property damage to your work if the property damage arises out of your work and is included within the products-completed operations hazard. However, recent cases have ruled that the your work exclusion does not apply when the policy declarations show coverage for products-completed operations hazard. See *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 157 So. 3d 148 (Ala. 2014); *Producers Co-op. Ass'n of Girard v. Cromwell Const., Inc.*, 253 P.3d 385 (Kan. Ct. App. 2011), unpublished (Minn. law) (Table); *Cincinnati Ins. Co. v. York Imperial Plastics, Inc.*, 15 Pa. D. & C.5th 69, 2010 WL 5312221, *76 (Pa. C.P. 2010).

In *Jim Carr*, an insurer filed a declaratory judgment action against its insured, a homebuilder, to determine whether property damage that occurred to a house after the owner's took possession of the home. The court looked to the policy's definition of "products-completed operations hazard" and the separate limits of coverage for it in the policy's declarations and concluded that 'your work' exclusion applies if and only if the Policy's declarations fail to show any coverage for 'products-completed operations.'

However, there are also numerous courts and commentators that disagree with this approach. See *James River Ins. Co. v. Fortress Systems, LLC*, 569 Fed. Appx. 896 (11th Cir. 2014) (Neb. law); *Ash v.*

Gainsco, Inc., 23 Fed. Appx. 797 (9th Cir. 2001) (Cal. law); *Berkshire Hathaway Homestate Ins. Co. v. SQI, Inc.*, 132 F. Supp. 3d 1275 (W.D. Wash. 2015); *Philadelphia Indemnity Insurance Company v. Lakeside Heights Homeowners Association*, 110 F. Supp. 3d 965 (N.D. Cal. 2015), appeal dismissed, (9th Cir. 15-16414)(Aug. 4, 2015); *Berkshire Hathaway Homestate Ins. Co. v. SQI, Inc.*, 2015 WL 1481728 (W.D. Wash. 2015); *Sparta Ins. Co. v. Colareta*, 990 F. Supp. 2d 1357 (S.D. Fla. 2014), appeal dismissed, (11th Cir. 14-10528)(Mar. 27, 2014); *American Home Assur. Co. v. AGM Marine Contractors, Inc.*, 379 F. Supp. 2d 134, 137 (D. Mass. 2005), aff'd, 467 F.3d 810, 2007 A.M.C. 172 (1st Cir. 2006) (“The ‘products-completed operations hazard’ provision is not a separate policy but a subpart of the entire policy.”); Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds* § 11:20 (6th ed.) (“The fact that there is generally coverage for and a separate policy limit for the completed operations hazard does not mean that claims encompassed by the hazard do not have to satisfy the basic insuring clause or are not subject to the exclusions in the policy”).

II. Overall Impact of Manuscript/Non-Standardized Endorsements

A. Effect on the Industry

1. Not all Playing by the Same Set of Rules. ISO (Insurance Services Office) Based Endorsements vs Manuscript/Non-Standardized Endorsements.

Insurance endorsements are documents attached to the insurance policy/contract. Some endorsements modify, change or exclude coverage. Many insurance carrier’s use standardized endorsements that are written and published by ISO and common in the insurance industry. Manuscript/ Non-Standardized endorsements are drafted by the insurance carrier and are used for a specific account or book of business. Examples of manuscript endorsements include but are not limited to “Excess Clause Additional Insured”, “Residential Exclusion”, and “Stucco Exclusion” type endorsements.

2. Knowing the Players – Leveling the Playing Field Between Co-Carriers

In many cases a loss may trigger multiple policy periods and/or the date of loss may not be identified creating the duty to defend among many insurance carriers for the same insured. Some insurance carriers who write manuscript or non-standardized endorsements can take a position coverage is modified or removed and maybe less likely to cooperate between co-carriers. Knowing and identifying those insurance carriers that write or provide coverage based on manuscript and non-standardized endorsements is essential to anticipate and predict a potential outcome reasonable to all parties.

Standard ISO endorsements are widely used in the marketplace. In many cases have been analyzed by the courts and an insurance carrier can anticipate how coverage can be interpreted. Manuscript and non-standard endorsements on the other hand may not have been court tested and are riskier for insurance carriers than standard endorsements drafted by ISO.

3. Does the Industry Anticipate Insurance Carriers Writing More Manuscript/ Non-Standard Endorsements? YES

More and more insurance carriers are considering the use of manuscript and non-standard endorsements. There can be multiple reasons for considering these types of endorsements which include but are not limited to:

1. Gaining a competitive edge
2. Considering a specific book or line of business
3. Broadening or removing coverage
4. Addressing a unique situation

B. Insurance Rates/Inability to Obtain Insurance

1. Intent of Coverage

The short answer is the purpose of insurance is to insure and the liability policy is designed to protect the insured for injuries, accidents and property damage. Unfortunately, as construction defect laws evolve and continue to change, questions arise from the insurance industry regarding what we intended to cover and who did we intend to insure.

Consider for instance writing a residential home painter who performs work for a national homebuilder. The painter signs a master contract which requires contractual indemnity and additional insured status to the national homebuilder. Was the intent of the insurer to cover and accept the risk for the national homebuilder as well as the named insured.

2. Costs and Ability to Predict Risk (Analytical Data) /Impact on Industry

In years past insurance carriers relied on specific guidelines, statistical models, current markets and experience in evaluating insurance policies. In many cases this information was outdated or inadequate to properly assess the constantly evolving world of construction defect resulting in improper premiums and account risk assessment.

Today more and more insurance companies are using data from internal and external sources to understand and develop predictive risk models. Predictive risk models assist in determining costs and selection of risk associated with a specific class of business or GL class code. With the evolving risk associated with construction defect losses, analytical data will enable insurance carriers to assess lines of business with more consistency. Overall, this will have an impact on the construction industry on the class of business a carrier considers, and premiums collected.

3. AM Best Rating/Financial Stability of Insurers

Not all insurance carriers are equal in financial strength. AM Best Financial Strength Rating "FSR" is an independent opinion of an insurer's financial strength and ability to meet its ongoing insurance policy and contract requirements. Rating Categories:

Superior: A+ thru A++
Excellent: A thru A-
Good: B+ thru B++
Fair: B thru B-
Marginal: C+ thru C++
Weak: C thru C-
Poor: D

It is important to be insured by a company with the financial strength to pay those obligations that may be owed.

C. Contribution/Subrogation Between Insurance Carriers

Jurisdictions in which there is no right to contribution between insurers sharing the same risk include Florida and South Carolina; however, a contribution statute has been proposed in FL (624.1055 Right of contribution among insurers for defense costs) and is waiting to be signed by the Governor. The statute applies to claims or suits after January 1, 2020. In South Carolina, various strategies for avoiding the no-contribution against co-primary carriers have been tried and all have failed. *Sloan Construction v. Central National Insurance Company of Omaha*, 236 S.E.2d 818 (S.C. 1977); *Shelby Mut. Ins. Co. v. Askins*, 307 S.C. 81, 413 S.E.2d 855, 859 (S.C.Ct.App.1992); *Assurance Co. of Am. v. Penn–America Ins. Co.*, No. 4:11–cv–03425–RBH, 2013 WL 1282141 (D.S.C. Mar.27, 2013); *Auto-Owners Ins. Co. v. Travelers Cas. & Sur. Co. of Am.*, No. 4:12-CV-3423-RBH, 2014 WL 3687338, at *6 (D.S.C. July 22, 2014), *aff'd*, 597 F. App'x 197 (4th Cir. 2015).